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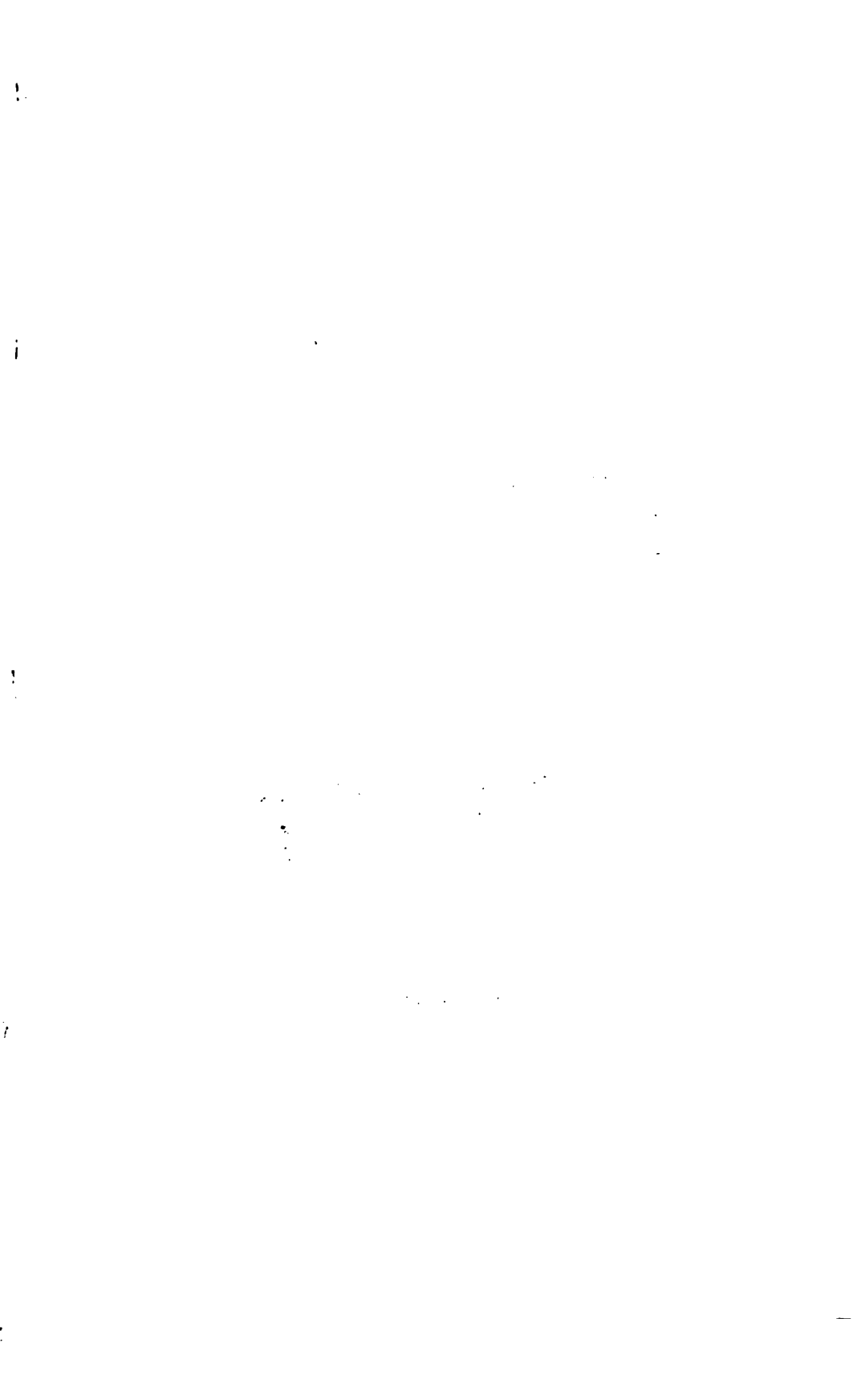
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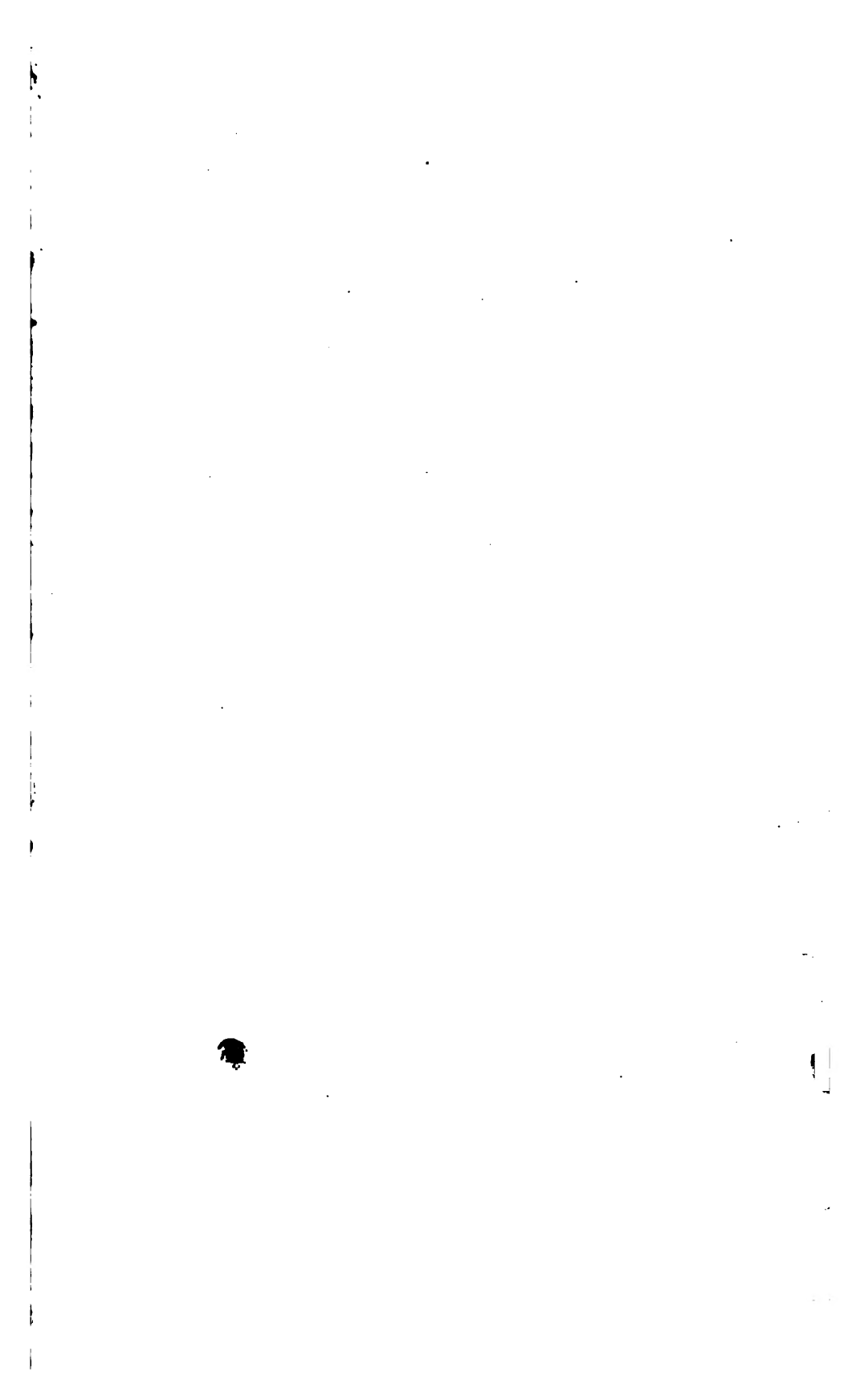
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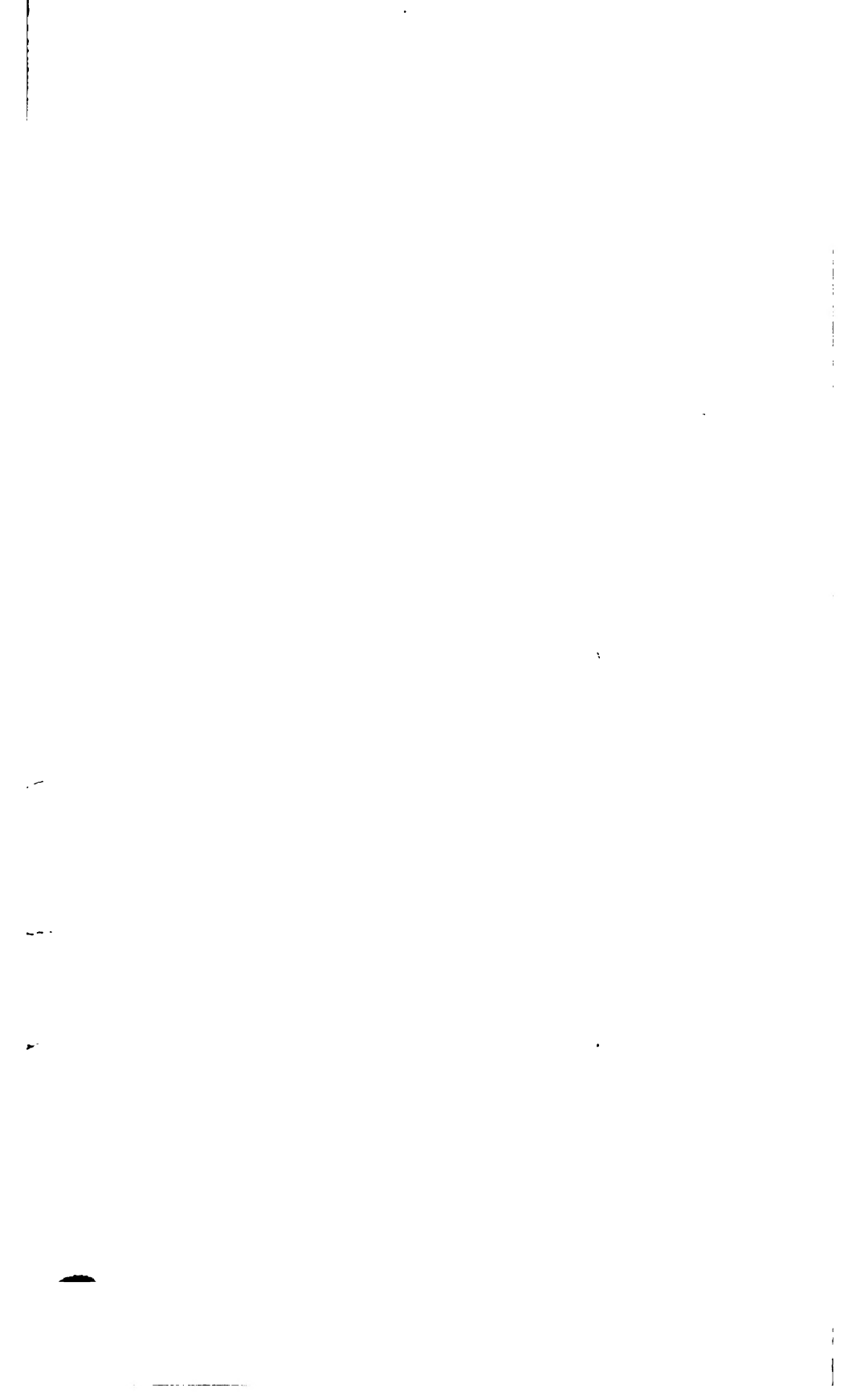
67	91	67	312
50h	49	4h	627
53h	240	11h	20
67	14	63a	320
23h	259	67	315
23h	341	4h	630
29h	545	67	323
53a	371	4h	673
67	19	63a	455
55a	673	67	330
67	35	4h	638
56a	533	67	333
67	62	4h	633
34h	157	64a	642
67	67	67	354
33h	509	67a	505
67	72	67	364
55a	657	98a	221
67	81	67	371
29h	476	36h	485
33h	544	67	379
67	83	24h	471
67	83	67	385
67	85	42h	88
67	86	67	393
22h	516	77a	143
67	101	67	397
59a	292	67	403
67	132	58a	681
42h	576	67	407
67	143	42h	19
42h	576	60a	265
67	154	67	411
37h	50	28h	47
40h	316	67	423
67	169	26h	209
114a	284	33h	506
67	202	67	446
42h	249	38h	242
67	205	67	473
31h	394	58a	1
67	214	67	487
68a	486	116a	649
67	226	67	501
1h	435	27h	284
64a	628	117a	599
67	228	67	538
60a	513	76a	305
67	243	67	544
33h	234	30h	43
67	256	116a	587
63a	652	67	518
67	261	28h	45
4h	648	35h	97
63a	422	63a	143
67	275	67	526
54h	441	69a	286
67	277		
14h	491		
67	283		
4h	630		
67	290		
69a	212		
67	295		
99a	20		

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REPORTS
OF
Cases in Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LXVII.

TO WHICH IS ADDED
A TABLE OF THE CASES
REPORTED IN THE 67 VOLUMES OF THE SERIES, WHICH HAVE
BEEN AFFIRMED, REVERSED, APPROVED, OVERRULED, &c.

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CASES

REPORTED IN THIS VOLUME.

A

Adams, Continental National Bank v.	818
Aitken v. Meyer,	181
American Board of Foreign Missions, Lathrop v.	590
Ayers, Van Arnam v.	544

B

Bagg, Burnet v.	154
Bainbridge, Matter of the petition of,	298
Ballou v. Parsons,	19
Baltis v. Dobin,	507
Bank of New York Nat. Banking Asso'n, Nolan v.	24
Barandon, Kennedy v.	209
Barker v. Burton,	458
Bartean v. Phoenix Mutual Life Ins. Co.	354
Bartholomew v. Lyon,	86
Baxter v. Missouri &c. Railway Co.,	283
Bean, Sweet v.	91
Bigelow, Meddaugh v.	106
Birmingham v. Farmers' Joint Ins. Co.,	595
Bissell v. New York Cen. &c. R. R. Co.,	385
Bixby, People ex rel. Lee v. ...	221
Blanchard v. New Jersey Steamboat Co.,	101

Blanchard v. Western Union Telegraph Co.,	228
Bostwick v. Dry Goods Bank, .	449
Brockett, Morse v.	284
Bronson, Cooter v.	444
Brooks v. Moore,	898
Buddensick, Haden v.	188
Burnet v. Bagg,	154
Burton, Barker v.	458

C

Camp v. Gifford,	484
Campbell v. Page,	118
Carpenter v. Coe,	411
—— v. Eastern Transp'n Line,	570
Carpenter v. O'Dougherty,	897
Central Crosstown R. R. Co., Christopher and Tenth Street R. R. Co. v.	815
Chaffee v. Morse,	252
Chase v. Miser,	441
Cheritree v. Roggen,	124
Chicago Northern &c. Co., Coffin v.	337
Chillingworth v. Freeman,	379
Chittenango Cotton Co. v. Stewart,	423
Christopher and Tenth Street R. R. Co. v. Central Crosstown R. R. Co.,	815
City of Buffalo, Read v.	526

City of Utica, Matter of the ap- peal of Lewis v.	456
Clancey, Dingens v.	566
Clause, Tammien v.	430
Coe, Carpenter v.	411
Coffin v. Chicago Northern &c. Co.,	337
Colgate, Speyer v.	192
Continental National Bank v. Adams,	318
Cooter v. Bronson,	444
Copp, Pease v.	182
Crane v. Onderdonk,	47
Crowell, Gilmore v.	62
Culhane v. New York Cen. &c. R. R. Co.,	562

D

Daly, People ex rel. Lewis v. ...	325
Darbee v. Elwood,	359
Decker, Goppail v.	211
—— v. Waterman,	460
Demarest v. Wickham,	312
Devlin v. Devlin,	290
Dingens v. Clancey,	566
Dinsmore v. Mayor &c. of New York,	341
Distler, Germania Bank v.	333
Dobin, Baltis v.	507
Downing v. O'Brien,	582
Dry Goods Bank, Bostwick v. ...	449

E

Eastern Transp'n Line, Carpen- ter v.	570
Eckert, Hallgarten v.	59
Elwell v. Grand Street and New- town R. R. Co.,	83
Elwood, Darbee v.	359
Embury, Excelsior Petroleum Co. v.	261
Excelsior Life Insurance Co., Patrick v.	202
Excelsior Petroleum Co. v. Em- bury,	261

F

Fall Brook Coal Co., Kelly v. .	183
Farmers' Joint Stock Ins. Co., Birmingham v.	595
Fish, Pardee v.	407
Fletcher v. Updike,	364
Freeman, Chillingworth v.	379
Fuller, White v.	267

G

Genet, Mayor &c. of N. Y. v. ...	275
Germania Bank v. Distler,	333
Gifford, Camp v.	434
Gilman v. Redington,	321
Gilmore v. Crowell,	62
Goppail v. Decker,	211
Graff, United States v.	304
Grand Street and Newtown R. R. Co., Elwell v.	83
Grissler v. Stuyvesant,	77
—— v. Stuyvesant,	81

H

Haden v. Buddensick,	188
Hallgarten v. Eckert,	59
Hamersley v. Mayor &c. of N. Y.,	35
Hopkins v. Ward,	452
House Avenue, Matter of open- ing,	350
Howland, Shellington v.	14

I

Ingersoll, People v.	472
Irish, Miller v.	256
Irwin, Pacific Mail Steamship Co. v.	277

J

Johnson, People ex rel. v. Lord,	109
—— v. Utica Water Works Co.	415

K

Keese v. New York, N. Haven &c. R. R. Co.,	205
Kelly v. Fall Brook Coal Co., ..	188
Kennedy v. Barandon,	209
—— v. Oswego and Syra- cuse R. R. Co.,	169
King, Marks v.	225

L

Lake Shore &c. R. R. Co., Spears v.	518
Lane, Vail v.	281
Lathrop v. American Board of Foreign Missions,	590
Lee, People ex rel. v. Bixby, ..	221
Lewis, Matter of the appeal of, v. City of Utica,	456
Lewis, People ex rel. v. Daly, ..	325
Linsday v. People,	548
Livingston v. Murray,	214
Lord, People ex rel. Johnson v.	109
Lynch v. Pendergast,	501
Lyon, Bartholomew, v.	86

M

Magee v. Magee,	487
Manton v. Poole,	380
Marks v. King,	225
Matter of Bainbridge,	293
—— House Avenue,	350
—— Lewis's Appeal, v. City of Utica,	456
—— New York Bridge Co.	295
—— New York Cen. R. R. Co.,	426
Mayer v. Mayor &c. of N. Y., ..	323
Mayor &c. of New York, Dins- more v.	341
Mayor &c. of N. Y. v. Genet, ..	275
——, Hamersley v.	85
——, Mayer v.	323
——, Smith v.	223
Mead v. Mercantile Mu. Ins. Co.,	519
Mechl, Schwieckart v.	599

Meddaugh v. Bigelow,	106
Mercantile Mutual Ins. Co., Mead v.	519
Merriam, Smith v.	403
Meyer, Aitken v.	131
Miller v. Irish,	256
—— v. National Steamship Co.	285
—— v. Shall,	446
Miser, Chase v.	441
Missouri &c. Railway Co., Bax- ter v.	283
Monell v. Northern Cen. R. R. Co.,	531
Moore, Brooks v.	398
Moran v. New York Cen. &c. R. R. Co.,	96
Morse v. Brockett,	234
Morse, Chaffee v.	253
Murray, Livingston v.	214

N

National Steamship Co., Miller v.	285
New Jersey Steamboat Co., Blanchard v.	101
New York Bridge Co., Matter of	295
New York Cen. &c. R. R. Co., Bissell v.	385
New York Cen. &c. R. R. Co., Culhane v.	563
New York Cen. &c. R. R. Co., Matter of	426
New York Cen. &c. R. R. Co., Moran v.	96
New York Cen. &c. R. R. Co., Tierney v.	538
New York, New Haven &c. R. R. Co., Keese v.	205
Nolan v. Bank of New York Nat. Banking Asso'n,	24
Northern Central R. R. Co., Mo- nell v.	531

O

O'Brien, Downing v.	583
O'Dougherty, Carpenter v.	397
Onderdonk, Crane v.	47
Oswego and Syracuse R. R. Co., Kennedy v.	160

P

Pacific Mail Steamship Co. v.	
Irwin,	277
Page, Campbell v.	113
Pardee v. Fish,	407
Parsons, Ballou v.	19
Patrick v. Excelsior Life Ins.	
Co.,	202
Pease v. Copp,	132
Pendergast, Lynch v.	501
People v. Ingersoll,	472
—, Lindsay v.	548
— v. Tweed,	496
—, Wightman v.	44
—, ex rel. Johnson v. Lord,	109
—, — Lee v. Bixby, ...	221
—, — Lewis v. Daly, ..	325
Phoenix Mutual Life Ins. Co.,	
Barteau v.	354
Poole, Manton v.	330
Pooler, Stafford v.	143
Potter v. Virgil,	578
Price v. Wilson,	9

R

Randall, Smith v.	377
Read v. City of Buffalo,	526
Redington, Gilman v.	321
Republic Insurance Co., Shaw v.	586
Roggen, Cheritree v.	124
Rusk v. Soutter,	871

S

Schwieckart, Mechl v.	599
Sergeant, Smith v.	243
Shall, Miller v.	446
Shaw v. Republic Insurance Co.,	586
Shellington v. Howland,	14
Smith v. Mayor &c. of N. Y., ..	223
— v. Merriam,	403
— v. Randall,	377
— v. Sergeant,	243
— v. Sonnekalb,	66
Sonnekalb, Smith v.	66
Soutter, Rusk v.	371
Spears v. Lake Shore &c. R. R.	
Co.,	513

Speyer v. Colgate,	192
Stafford v. Pooler,	143
Stewart, Chittanooga Cotton	
Co. v.	423
Stayveasant, Grisler v.	77
—, Grisler v.	81
Sweet v. Bean,	91
— v. Titus,	327

T

Tammien v. Clause,	430
Tierney v. New York Cen. &c.	
R. R. Co.,	538
Titus, Sweet v.	327
Troudden, Van Etten v.	342
Tweed, People v.	496

U

United States v. Graff,	304
Updike, Fletcher v.	364
Utica Water Works Co., John-	
son v.	415

V

Vail v. Lane,	281
Van Arnam v. Ayers,	544
Van Etten v. Troudden,	342
Van Tuyl v. Westchester Fire	
Ins. Co.,	72
Virgil, Potter v.	578

W

Ward, Hopkins v.	452
Waterman, Decker v.	460
Weaver, Whyland v.	116
Westchester Fire Ins. Co., Van	
Tuyl v.	72
Western Union Telegraph Co.,	
Blanchard v.	228
White v. Fuller,	267
Whyland v. Weaver,	116
Wickham, Demarest v.	312
Wightman v. People,	44
Wilson, Price v.	9

CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

DANIEL PRICE *vs.* DANIEL M. WILSON and JAY GOULD,
impleaded, &c.

A witness having been examined, before a referee, on the part of the defence, the referee, pending the cross-examination, adjourned the trial. The witness neglecting to appear for further cross-examination, he was required by the referee to appear on one of three days, or, in default thereof, to have his examination stricken out. He failed to appear, and upon the plaintiff's motion and on notice to the counsel of the witness, his testimony was stricken out. *Held* there was no injustice or impropriety in this course.

By articles of copartnership, G., one of the partners, was to devote his time and services, generally, to the business, and was to be allowed \$1,000 per annum, for such services. He discharged the duties he was required to perform; but his salary was not paid, nor credited to him on the books of the firm. It appeared that W., another partner, had the general control of the office business, including the books of account. *Held* that the neglect to enter a credit of the salary in the books was not an act of G., nor a waiver of the salary by him.

The personal liability for debts of a corporation, imposed upon its officers for neglecting to publish a notice under a statute, is in the nature of a penalty;

Price v. Wilson.

and such a penalty, imposed by the laws of another state will not be enforced in the courts of our own. Hence, upon an accounting between partners, such a liability on the part of one of them, to the firm, cannot be considered.

APPEAL, by the defendants, from a judgment entered upon the report of a referee, in an action for an accounting between partners.

Salter & Cowing and J. C. Jackson, for the appellants.

Henry Daily, Jun., for the respondent.

By the Court, LEARNED, J. This is an equity action, brought for the purpose of settling a partnership and for an accounting among the partners. It has been referred to a referee, who has made his report; from which the defendants appeal.

During the trial, Jay Gould was examined as a witness on the part of the defence. Pending his cross-examination, the referee adjourned the trial. Gould neglected to appear for further cross-examination. He was required by the referee to appear on one of three days, or, in default thereof, to have his examination stricken out. He failed to appear, and upon the plaintiff's motion and on notice to Gould's counsel, his testimony was stricken out. There was no injustice or impropriety in this course. The plaintiff was entitled to the benefit of the cross-examination; and the defendant Gould was in fault for not attending.

The referee disallowed a claim of Gould for salary. By the articles of copartnership Gould was to devote his time and services generally to the business, and was to be allowed \$1,000 per annum for such services. Two others of the partners were also to be allowed salaries. The referee finds that the salaries of these two were regularly credited on the books; but that the salary of Gould was not paid or credited. And this failure to credit the

salary is held by the referee to be a waiver of it. It is not found by the referee that Gould failed to perform the duties imposed upon him by the articles ; and it is found that Wilson had the general control of the office business, including the books of account. As it does not appear, therefore, that Gould had the charge of the books, the neglect to enter the salary was not an act of his. By the express terms of the copartnership agreement Gould was entitled to receive a salary. So far as appears, he has discharged the duties which he was required to perform. Something more, then, than a mere neglect by another partner to credit him his salary is needed, to constitute a waiver; even if he had seen the books. The partnership continued only about sixteen months, and there is no express agreement, in the articles, when salaries are payable. An entry in the partnership books, when they are accessible to all the partners, is undoubtedly strong evidence against them. But a mere omission to enter an item which might properly be on the books cannot have quite as much weight. Certainly not, unless the omission were long continued or repeated. In the present case, supposing that it would have been proper to enter the salary at the close of the year, there was an omission of only four months. While the right to a salary was fixed by the very articles of partnership, Gould may have relied on those articles. There is not, therefore, as it seems to me, enough to show a waiver of the salary of Gould, and it should have been allowed.

The most important question, however, in this case, is whether the plaintiff is to be charged with the debt owing by the New Jersey Patent Tanning Company, to the firm of Wilson, Price & Company. The plaintiff, Price, was a stockholder and director and the president, of the New Jersey Patent Tanning Company, a corporation organized under the general manufacturing law of New Jersey. That corporation became, and on the 1st day of August, 1860, was, indebted in a large amount

Price v. Wilson.

to the firm of Wilson, Price & Co. By the laws of New Jersey such a corporation is required, annually, on or before the 1st day of April, to give a notice in a certain newspaper, signed by the president and a majority of the directors, and verified, of the amount of stock actually paid in, &c. In default thereof, the president and directors are jointly and severally liable for all existing debts of the corporation. Such liability may be enforced by an action on the case or by a bill in chancery. The corporation above mentioned neglected to give that notice. And thereupon the plaintiff, Price, incurred the aforesaid statutory liability. The question is, whether that liability can be brought into this accounting. The referee held that it could not.

This subject has been thoroughly examined in other cases, and it is sufficient to refer to them. In *Bird v. Hayden* (2 Abb., N. S., 61) it is decided that a liability of this kind, imposed on directors for a neglect to publish a notice, under a statute, is in the nature of a penalty; and that such a penalty, imposed by the laws of another state, will not be enforced in the courts of our own. The same doctrine was settled in the courts of New Jersey, in respect to a similar New York law, in the case of *Derrickson v. Smith* (3 Dutcher, 160.) If Price were sued in the courts of New York, on this alleged liability arising under New Jersey laws, he could not, under these decisions, be made liable. There is no reason, therefore, that it should be enforced against him by a defendant when he is plaintiff in the same courts.

It is not necessary to consider, here, whether or not, in the courts of New Jersey, Price, as director of that corporation, would be held liable for that statutory penalty to a firm in which he was a partner. It is sufficient that the cases above mentioned, and others therein cited, show that the courts of our state will not enforce such a penalty, imposed by laws of a foreign state.

Price v. Wilson.

There were nine notes given in evidence, on some of which the plaintiff, and on others of which the defendant Wilson, was liable. These notes appear to have been accommodation paper, loaned to the Tanning Company. It is claimed by the defendant Gould that the Tanning Company paid off these notes with money furnished by the firm of Wilson, Price & Co. The facts to sustain this view are not found by the referee. But assuming the facts to be so, the dealing of Wilson, Price & Co. was with the Tanning Company. Any money advanced was advanced to that Tanning Company; and the liability for the same was the liability of the Tanning Company. It cannot be charged against Price or Wilson.

The judgment, therefore, should be modified by crediting Gould with the amount of his salary \$1,416.67, with interest thereon from March 15, 1865, to October 15, 1869, that being the computation of interest in the referee's statement, making \$1,871.13. One quarter of said amount, viz., \$467.78 should be deducted from the sum adjudged to be recovered by the plaintiff against said Gould, and one quarter thereof should be deducted from the sum adjudged to be recovered by said Wilson against said Gould. The deductions to be as of the date of the referee's report. In other respects the judgment should be affirmed, without costs of appeal to either party.

Judgment, as modified, affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, January 6, 1878.
Ingraham, Brady and Learned, Justices.]

SHELLINGTON *vs.* HOWLAND.

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In order to render a stockholder in a manufacturing corporation personally liable for the debts of the corporation, under sec. 24 of the act of 1848 (chap. 40,) it is not necessary for a creditor to show a judgment recovered against the corporation, and an execution returned unsatisfied in whole or in part.

The clause of that section which requires the return of an execution unsatisfied applies only to stockholders who have ceased to be such; not to persons sued as stockholders of the company. An agreement to sell stock, not consummated, is not enough to authorize the defence that the creditor's remedy against the corporation has not been exhausted.

Under section 25 of the act of 1848, a completed transfer of the stock, entered on the books of the corporation, is essential, in order to exonerate the original stockholder from his liability for the debts of the corporation.

The corporation being absolutely required, by that section, to keep a book which shall show who the existing stockholders are, it is no answer to a creditor objecting that an alleged transfer was not registered, to say that the company had no such book, at the time.

Section 24 of the act of 1848, requiring, as a condition precedent to the personal liability of a stockholder, the commencement of a suit against the corporation, for the recovery of a debt, is not complied with by commencing a suit for the recovery of a *part* of the debt.

Accordingly, where a creditor brought an action against a corporation, before a justice of the peace, upon an account for work and labor, &c., amounting to \$366,60, the complaint claiming \$200 only, (that being the extent of the justice's jurisdiction,) and no suit had been brought against the company for the balance of the account; *Held*, in an action by a creditor against a stockholder, that the recovery must be limited to \$200 and interest.

A PPEAL from a judgment for the plaintiff, entered on a verdict at the Monroe circuit.

John Van Voorhis, for the appellant.

Theodore Bacon, for the respondent.

By the Court, TALCOTT, J. This action was brought to charge the defendant as a stockholder of the "Penfield Paper Company," a corporation created under the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," (*Laws of 1848, chap. 40*.) for a debt due to the plaintiff

Shellington v. Howland.

for services performed by him as a servant and laborer for the corporation. This case was once before brought to the General Term, and a verdict for the plaintiff was there set aside and a new trial ordered, on account of a failure to prove compliance with the condition precedent imposed by the 24th section of the act, which provides that "no stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due." That defect of proof has been supplied on the second trial. It is now claimed that it was necessary for the plaintiff to have gone farther, and to have shown a judgment recovered against the corporation, and an execution against it returned unsatisfied, before bringing his action against a stockholder. Although, if we could be permitted to substitute our own ideas of what would be just and expedient in place of the legislative enactment, we might be very ready to come to the conclusion that a creditor should be compelled to exhaust his remedy against the corporation before being permitted to maintain his suit against an individual stockholder, we are unable so to construe the statute without violence to the language. The 24th section of the act, which is in question, is as follows, viz. : "No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due ; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any debt contracted, unless the same shall be commenced within two years from the time he

Shellington v. Howland.

shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied in whole or in part."

The defendant was sued as a stockholder of the company, not as one who had ceased to be such stockholder. It is true that the defendant claims that he agreed with Hogeboom and Wheeler, the president and superintendent of the company, to sell his stock nominally amounting to \$4,000 to the company for \$800, to be paid in paper. It is not shown that Hogeboom and Martin, or either of them, had any authority to make this purchase on behalf of the company, or that it was ever ratified by the company or the consideration paid.

No evidence was given that the shares held by the defendant had ever been transferred upon the books of the company. In fact, it was substantially conceded that they had not been so transferred, and the reason offered for this was that the transfer book had probably been burned before the time when the defendant had agreed to sell his stock to the company. The 25th section of the act provides that "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company * * * until it shall have been entered," &c. Under similar provisions to this it has been held that a transfer of stock not entered on the transfer book, is so far valid, as between the parties to the transfer and the corporation as to confer an equitable title upon the transferee, with the right to demand and enforce a transfer against the company; but on the other hand, it has also been held that a completed transfer entered on the transfer book is essential in order to exonerate the original stockholder from his liability to creditors. Creditors can only be governed in giving credit, and in commencing actions, by what appears upon the transfer book. And cannot know what transfers have taken place by merely handing over the stock cer-

Shellington v. Howland.

tificate from one to another with a power of attorney to transfer indorsed. To allow a creditor to be defeated by such a secret transfer would be a fruitful source of fraud and surprise. The corporation is absolutely required by the 25th section to keep a book which shall show who the existing stockholders are; and it is no answer to a creditor objecting that the alleged transfer was not registered, to say that the company had no such book at the time of the alleged transfer. It is doubtless within the power of any stockholder to compel the officers of the corporation to keep such a book as the statute requires; and if it has been casually destroyed its place should be supplied, if those who might avail themselves of the fact that they have ceased to be stockholders desire to protect themselves.

If the foregoing views are correct it becomes unnecessary to consider what effect the injunction issued out of the court of bankruptcy, restraining the farther prosecution of suits against the corporation, might have in excusing the performance of the condition precedent; nor is it necessary to consider how far the proving and establishing of the debt under the bankruptcy might be considered a judgment, and the final distribution an execution, within the meaning of the manufacturing act.

For the reasons before stated we are of opinion that the plaintiff was entitled to recover. A question then arises as to the amount which he was entitled to recover. The verdict directed for the plaintiff was for \$306.60 of principal with interest, in addition. The action was upon a continuous account for work and labor, extending from June 24th, 1869, to February 1st, 1870, amounting in all to \$306.60. The action which was brought against the company was commenced before a justice of the peace, and the complaint in that action was for work, labor, &c., to the amount of \$200, which was the extent of the jurisdiction of the justice. The plaintiff, if he

Shellington v. Howland.

had proceeded with the suit before the justice, could not afterwards have sued the corporation upon the balance of his account, which could not be split up and made to form the basis of several distinct actions. The twenty-fourth section of the act, requiring that before resorting to the liability of the stockholder a suit shall have been commenced against the corporation, requires that the suit shall have been commenced for "such debt," that is, the same debt for which it is sought to charge the stockholder, neither more or less. It is to be presumed that the stockholder and the company were expected by the legislature to obtain information of the nature and extent of the claim against the corporation from the suit commenced against it, and the stockholder to be thereby enabled to judge of the nature and extent of his own liability, and to be governed by what he might thus learn in regard to any measures for defence or indemnity to be adopted by him. This seems to be the only reason why the mere commencement of a suit against the corporation is required as preliminary to any attempt to enforce the liability of a stockholder. At all events no suit has been commenced against the company for any part of the debt recovered against the stockholder in this action except for \$200, parcel of the plaintiff's account, and it seems to be clear that as to any excess over the sum of \$200, the statutory condition precedent, namely, the prior commencement of a suit against the corporation for its recovery, has not been complied with.

We are of the opinion, therefore, that the plaintiff is entitled to his recovery, but only to the extent for which a suit had been commenced against the corporation.

The judgment is affirmed, upon the condition that the plaintiff stipulate, according to the practice, to deduct from the verdict and judgment all except the sum of \$200, with interest, thereon from February 1st, 1870. Otherwise the judgment is reversed and a new trial

 Ballou v. Parsons.

ordered with costs to abide the event. Costs of appeal to neither party.

Judgment accordingly.(a)

[FOURTH DEPARTMENT, GENERAL TERM at Syracuse, January 7, 1873.
Mullin and Talcott, Justices.]

(a) Affirmed by Court of Appeals. See 53 N. Y., 371.

BALLOU and others vs. PARSONS and another.

On the taxation of costs, upon a judgment on the report of a referee, the referee's decision awarding judgment, stands before the clerk as the mandate of the court, and until vacated and set aside, such direction should be obeyed. The clerk has nothing to do with the question whether it has been regularly obtained.

Where there is an oral agreement, made before the referee, in open court, at the time of final submission, extending the time for making and delivering the report *indefinitely*, a party cannot terminate the reference, and bar the right to a decision by the referee, by serving a notice under section 273 of the Code.

It seems that, in such a case, the proper method of terminating the stipulation for indefinite extension is to serve upon the opposite party and the referee, a notice that unless the report is made and delivered within a reasonable time, to be specified, the reference will be deemed ended.

THE referee appointed in this action having made a report therein in favor of the plaintiff for \$8,113.80, with costs, which the defendants claimed was irregular, and the plaintiffs having presented their bill of costs to the clerk for adjustment, the clerk refused to tax said costs, which refusal the plaintiffs claimed was irregular. For the purpose of presenting for judicial determination the above questions, it was stipulated and agreed between the attorneys for the respective parties that the plaintiffs might present to Judge BOOKES, at Chambers, or at Special Term, the questions presented by such refusal of the clerk, upon the papers presented to and used by said

Ballou v. Parsons.

clerk on such application for decision, as upon an appeal from said taxation; that at the same time, and upon the same papers, the defendants might ask to have the report of the referee set aside, as upon a motion by them for that purpose; and that either party might appeal from the whole or any part of the order made on such hearing.

The case was accordingly heard at Special Term, and the following decision rendered by Justice BOOKES.

D. A. Boies, for the plaintiffs.

Paris & Terry, for the defendants.

BOOKES, J. Two motions heard together — one by the plaintiffs to compel the clerk to adjust their costs and enter judgment, the other by the defendants to set aside the report.

The disposition of the motion to set aside the decision of the referee will, of course, determine the other; but it may be remarked here that the refusal of the clerk to adjust the plaintiffs' costs and to enter judgment, according to the decision, was wrong. The referee's decision, awarding judgment, stood before the clerk as the mandate of the court. The clerk had nothing to do with the question whether it had been regularly obtained. That question was for the court, on proper application. Until vacated and set aside, its direction for judgment should be obeyed.

The important question, however, is now as to the regularity of the referee's decision — whether it was made and delivered in due time.

The case was a long time on trial before the referee, and was finally submitted to him for decision on the 9th April, 1869. He held it under advisement until November 19th, 1872, when he made and delivered his decision, awarding judgment to the plaintiffs for \$6,113.80, the amount claimed in the complaint, with costs. In the

meantime, and on the 28th October, 1872, the defendants' attorneys served the plaintiffs' attorney with a notice of their election to terminate the reference.

Now, in the absence of any stipulation or agreement of the parties to extend the time within which the decision should be made and delivered, of course the report was out of time and irregular. (*Code*, § 273.) In that case the notice from the party of an election to end the reference, foreclosed all further right to proceed on the part of the referee. (10 *Abb.*, *N.S.*, 289.)

But while it is conceded that there was no stipulation or agreement of the parties *in writing* to extend the time, it is claimed and urged that there was an oral agreement before the referee in open court, made at the time of the final submission to him, extending the time within which the report might be made and delivered *indefinitely*. And it is further insisted that when such indefinite extension is given, a party cannot terminate the reference and bar a right to a decision by the referee, by serving a notice of an election to end the reference; that in such case a reasonable notice to the referee and opposite party should be given that a report is demanded, or an order should be obtained from the court, requiring a report within a specified time.

The first question here is one of fact: whether the time was extended indefinitely as is claimed. After a very careful examination of the papers submitted on the motion, I am of the opinion that it must be found that the parties had that understanding, amounting to an agreement to that effect. Such, I think, is the weight of evidence on the papers submitted, and I am bound, I think, so to hold. This understanding and agreement was made and entered into in the presence of the referee, at the time of the submission of the case to him for decision, and he was a party to it. Indeed it was made for the benefit and convenience of the referee, as well as in the interest

Ballou v. Parsons.

of the parties themselves, who desired a full and careful consideration of the case. Entered into in the presence of the referee, at the time of the submission, the agreement must be deemed to have been made in open court. A stipulation or agreement thus made, relating to the conduct of the suit, is binding on the parties. (25 How., 1. 41 Barb., 648. 7 Paige, 587.) To hold it binding seems to me but fair and just to the parties and to the referee. If these conclusions be sound, the case is the same as if the parties had agreed and stipulated in writing for an *indefinite extension* of time for the referee to make and deliver his report.

The next question is, how such *indefinite extension* of time may be terminated? Undoubtedly either party may terminate it by some fair proceeding. The question is how it may be done? Can it be terminated abruptly and *instantly*, by the service of a notice on the opposite attorney of an election to end the reference? Is this quite right to the party and to the referee who may have delayed his report, relying on the agreement of extension; should not a little time be allowed before foreclosing further action? The fairer and better rule would be, as it seems to me, to require in such case, a notice to the party and referee, one or both, that unless the report is made and delivered within a reasonable time, to be specified — say ten or twenty days — the reference will be deemed ended. This would render definite what was before left by stipulation indefinite. This rule is in conformity also with that applied to all agreements when performance is left indefinite, and it is just in its application. Such, too, is the spirit of the decision in *Thieselin v. Rossett*, (3 Abb., N.S., 54.) It was there held in substance that relief should be obtained against delay by application to the court for an order of limitation. But I see no necessity for such application when the party and referee have been duly notified of an intention

to terminate the reference, fixing in the notice a reasonable time within which the report might be made and delivered. This would be a fair way to terminate the stipulation for an indefinite extension.

Under such a rule of practice either party could end the reference without unreasonable delay. Either could serve a notice on the opposite party and referee at any time, limiting the period within which the report should be delivered. Had this fair rule of practice been applied to this case the great delay which here existed could have been prevented by a reasonable notice from either party. If so inclined either could have obtained a report or terminated the reference in twenty days following the time given the referee by section 273.

Again, I think the referee has rights, after an extension like that given in this case, which should not be ignored. When there is no extension of the time he is bound to make and deliver his report within sixty days after final submission, or the consequences follow specified in section 273. But he should not be held to the penalty of a forfeiture and loss of fees, fairly earned, perhaps to a large amount, for a delay to which the parties gave consent.

The case of *Gregory v. Cryder*, (10 Abb., 289,) was one wherein there was no extension of time, nor waiver of strict compliance with the provisions of section 273. That case differs on the facts from this under examination.

After considerable reflection I am brought to the conclusion that the notice served on the plaintiffs' attorney did not have the effect to terminate the reference, and that the report thereafter made and delivered by the referee is not irregular.

The motion to vacate and set aside the report or decision of the referee must be denied, and the plaintiff is entitled to have judgment entered thereon with costs.

Nolan v. Bank of New York National Banking Association.

The clerk will, of course, now adjust the plaintiffs' costs and insert them in the entry of judgment. Costs of but one motion are allowed. (a)

[SARATOGA SPECIAL TERM, April 15, 1878. *Bockes*, Justice.]

(a) On appeal the above opinion was adopted, and the decision affirmed by the General Term in the Third Department, and the decision of the latter court was affirmed by the Court of Appeals. (See 55 *N. Y.*, 673 *S. C.*)

LOUISE J. NOLAN *vs.* THE BANK OF NEW YORK
NATIONAL BANKING ASSOCIATION.

A check, dated Jan. 21, 1865, was drawn by M. & Sons, payable to their own order, upon the defendant, and indorsed by the drawers. It was, on or about that date, accepted by the drawee, certified to be "good," and registered. On the 4th of February, 1865, the check while in the hands of M. & G., was stolen from their book-keeper. Notice of the theft was given to the bank, or payment of it stopped, on the same day. In May or June, 1865, the plaintiff became the owner and holder of the check, paying value for it, and taking it in a legitimate manner, as an investment, after making all the inquiries which it was incumbent upon her to make.

Held, 1. That if the signatures to the check and certificate were genuine, the plaintiff was not bound, by anything appearing upon the face of it, to exercise any other caution, vigilance or diligence, so far as the bank was concerned.

2. That the check was not to be deemed dishonored, like a promissory note payable on demand, from the delay in presenting it for payment, but on the contrary, was paid by the drawers, by an absolute appropriation of their funds to meet it, which the bank held for the transferee, whoever he might be.
3. That the certificate was to be regarded as an acceptance, payable on demand, and was obligatory until paid, or the statute of limitations should attach as a bar.
4. That the court below erred in deciding that the plaintiff was not entitled to recover upon the check, against the bank because the same was, in judgment of law, dishonored.
5. That the check having been stolen, it became the duty of the plaintiff to establish that she was a *bona fide* holder for value; and that the refusal of the judge to submit that question to the jury, on the ground that the check was overdue and taken subject to existing equities, was error.

The question of equities between any of the prior parties to a certified check cannot intervene against a *bona fide* holder for value. He deals upon the paper alone, looking to the bank as the primary debtor.

Nolan v. Bank of New York National Banking Association.

THIS action was brought to recover the amount of a check for \$5,000, dated New York, January 21, 1865, payable in gold, drawn by Morgan & Sons, on the Bank of New York, payable to their own order, and which was accepted by the bank and certified to be good, and so put in circulation. The bank afterwards reorganized as a national bank under the name as above entitled; and the new association continued the business and assumed the liabilities of the old corporation, the Bank of New York. This check, it was claimed, was not intended either by the drawers or the drawee to be immediately paid, as it was accepted by the drawee and certified to be good, and so went out into the world.

At that time, and long afterwards, such checks drawn on that bank, payable in gold, and registered as this was, were circulated and used by the mercantile community as gold, and were thus kept in circulation a long time. In May, 1868, the plaintiff in this case, living at New Orleans, and having money to invest, in perfect good faith, and after making inquiry as to the genuineness and value of the check, and exhibiting it, or causing it to be exhibited to bankers and correspondents of the drawers and others, purchased it, giving full value for it. It was soon afterwards presented to the bank (the defendant) for payment, and payment was refused; and in this action the defence was that on or about the 4th of February, 1865, while the firm of Myer & Greve were owners of the check, it was lost by or stolen from a clerk of theirs. And that afterwards Myer & Greve having indemnified the bank, the bank paid the amount to them, and defend this suit for their benefit.

At the trial the court directed a verdict for the defendant, and ordered the exceptions to be heard in the first instance at the General Term.

The plaintiff appealed from the judgment, and upon a case and exceptions moved for a new trial.

Nolan v. Bank of New York National Banking Association.

B. K. Phelps, for the appellant. I. The court having directed a verdict in favor of the defendant, all presumptions and all disputed questions of fact, must, on this hearing, be held in favor of the plaintiff, and the case, on this application for a new trial, must be considered, wherever there is a dispute, as if the facts were as shown by the plaintiff's evidence only. *Ward v. C. P. N. & E. R. R. Co.*, 42 *How.*, 291. *Cook v. N. Y. C. R. R. Co.*, 3 *Keyes' Rep.*, 476. *Wells v. Mann*, 45 *N. Y. Rep.*, 331. *Stone v. Fowler*, 47 *N. Y. Rep.*, 566.

II. The check was negotiable, and, according to the evidence, the plaintiff purchased it in good faith, and gave full value for. There was nothing to arouse her suspicions. It was openly offered for sale, the owner refusing to sell it for less than its face. The plaintiff was not bound, before purchasing it, to make any inquiry at all, yet, for the purpose of ascertaining its genuineness and value, she caused it to be exhibited to merchants, bankers, and correspondents of the drawers, before she purchased it, who reported it to be good. If such persons pronounced it good, and knew nothing of its having been lost or stolen, why should she have suspicion. Such being the evidence, the plaintiff was a *bona fide* purchaser and owner, in good faith; and being such *bona fide* purchaser and owner, the fact that it had been lost by, or stolen from, a former owner, was no defence. *Welsh v. Sage*, 47 *N. Y. Rep.*, 143. *Magee v. Badger*, 34 *id.*, 248. *Belmont Branch Bank v. Hoge*, 35 *id.*, 65. *Turnbull v. Bowyer*, 40 *id.*, 456. *Birdsall v. Russell*, 29 *id.*, 220. *Goodman v. Simonds*, 20 *How. U. S.*, 343. *Seybell v. National Currency Bank*, 4 *Abbott, N.S.*, 352. *Murray v. Lardner*, 2 *Wallace*, 110. *Miller v. Austen*, 13 *How. U. S.*, 218. *Farmers' & Mech. Bank v. Butch. & Drov. Bank*, 16 *N. Y.*, 128. *Mead v. Merchants' Bank of Albany*, 25 *id.*, 143.

III. On the trial the plaintiffs' counsel offered to show

Nolan v. Bank of New York National Banking Association.

that by the custom of the mercantile community in 1865, 1866, and 1867, such checks on this bank circulated, and were received, transferred, and accepted as gold, and that they were so kept in circulation a long time without being presented for payment. But the court held it irrelevant and incompetent, and excluded the evidence. In this the court erred.

IV. The plaintiff testified that before she bought the check she had possession of it for an hour or two; took it to Mr. Fleming's office, and gave it to him, with instructions to go to the different banks and inquire the worth and value of the check; that Mr. Fleming went out with it, and then sent his book-keeper, Mr. Crane, out with it. Then plaintiff's counsel offered to show what Mr. Fleming and Mr. Crane reported to her as the result of their inquiries, and the defendants' counsel objected, without stating any grounds of the objection, and the objection was sustained. That was error.

1. As no grounds of the objection were stated, it was error to sustain it, if the evidence or fact sought to be proved was material or proper for any purpose. (45 *N. Y. Rep.*, 753. 12 *id.*, 442, 451. 7 *Bosworth*, 481.) 2. If there was anything about the paper casting suspicion upon it, and if that was material for the defence in the case, it was proper for the plaintiff to repel it, by proving anything said by anybody which did or would naturally have a tendency to remove that suspicion from her mind. It would have been material for the purpose of showing that she was acting honestly and in good faith, which is all that the law requires of a purchaser in such a case. (47 *N. Y. Rep.*, 143. 34 *id.*, 248. 4 *Abbott, N.S.*, 352.) It was not the kind or quality of the evidence that was objected to, but the proof of the fact itself. But, in fact, it was not objectionable for any purpose. If their report would have been favorable (and for this purpose it must be presumed that it would have been,) it would have been proper, even if false.

Nolan v. Bank of New York National Banking Association.

The material fact would be that she was informed (by Fleming & Crane) and believed the check to be good and, therefore, in purchasing it acted honestly and in good faith.

V. The court held, as a matter of law, that the defendant was entitled to a verdict, and refused to submit any question to the jury, and directed a verdict for the defendant, to which, as to all of the other rulings on the trial, the plaintiff's counsel excepted. This ruling was wrong. 1. The evidence in the case shows that the plaintiff purchased the check, which was negotiable, in good faith, and gave full value for it. She, then, and not the defendant, was entitled to recover as a matter of law. 2. If there was any conflict of evidence, or any question about her honesty or good faith in the transaction, it was a question for the jury.

Therefore, in either or any view of the case, the court erred in directing a verdict for the defendant, and a new trial should be granted.

Thos. C. T. Buckley, for the respondent. I. The legal character of a check is not altered by the certification, and the only obligation assumed by the certifying bank is that assumed by the acceptor of a bill of exchange.

II. A check is, in judgment of law, an inland bill of exchange. The definition of the instrument given in the cases and in the treatises is, that it is such an obligation. (*Chapman v. White*, 2 Seld., 412. *Aetna National Bank v. The Fourth National Bank*, 46 N. Y., 82, *Allen, J. Salt Springs Bank v. The Syracuse Savings Institution*, 62 Barb., 105. *Edwards on Bills*, 57. *Robson v. Bennett*, 2 Taunt., 388. *Farm. and Mech's. Bank of Kent Co. v. Butch. and Drov. Bank*, 4 Duer, 220; S. C., 14 N. Y., 623; 16 *id.*, 128, 144; 28 *id.*, 426. *Mead v. Merch. Bank of Albany*, 25 *id.*, 146, 150. *Clafin v. Farm. and Citizens' Bank*, *Id.*, 294. *Smith v. Miller*, 43 *id.*,

Nolan v. Bank of New York National Banking Association.

176. *Barnes v. Ontario Bank*, 19 *id.*, 159. *Merchants' Bank v. State Bank*, 16 *Wallace*, 647.

III. The obligation assumed by the defendants, when the check was certified, being that of an acceptor of a bill of exchange, equivalent, as shown by the authorities cited, to that of a maker of a demand note, it has been held that after reasonable period has elapsed for presentment, this check is to be treated and considered as an overdue obligation. (*See Herrick v. Woolberton*, 41 *N. Y.*, 581.) It therefore follows that the plaintiff could not, receiving this check at the time she did, become in judgment of law a *bona fide* holder thereof, so as to overcome the equities existing between the bank and Meyer & Greve, the previous holders to whom the check was paid, and hence the court, as matter of law, properly instructed the jury to find for the defendants.

IV. The instrument in question having a certain defined character in the law, and its capacity for negotiation when dishonored or overdue in judgment of law, being settled by the law, which also determines the legal position of the party taking the same when so dishonored, any custom of the mercantile community, such as was offered to be shown, was incompetent and irrelevant, and was properly excluded. To show that certified checks were received in New York as representing the amount in gold they bore on their face, would have no legal weight on the question of title of the plaintiff—a woman not in business—acquired in New Orleans, and no offer was made to prove the custom in New Orleans. To show a custom to keep them in circulation without presentment, as an answer to the legal consequences of that act would be incompetent. (*See Wheeler v. Newbould*, 16 *N. Y.*, 392, 402).

V. The question of *bona fides* of Mrs. Nolan's ownership was a question of law, and not of fact, and, therefore, no error was committed by the court in refusing

Nolan v. Bank of New York National Banking Association.

to submit that question to the jury. 1. In no aspect of the case can plaintiff be truly considered a *bona fide* holder of the check. She did not receive the same in the usual course of business, and without notice of facts tending to impeach the validity of the paper. She had distinct notice, from the date of the check, that there was an irregularity somewhere. A check so certified is said by Gould, J., in *Clafin v. The Farmers' and Citizens' Bank*, to have no time to run, and credit in the light of time given is no element of it. Yet, in the face of this irregularity, in a city different from that on which the check was drawn, she loans to a perfect stranger \$4,000. 2. Plaintiff lacks every element of *bona fides* and value. She was not in business, nor did she receive it in any course of business. The contrivance of bringing in a woman to represent the title is old and stale, and evidence that no business man would have touched it. A woman who goes out of her way to dabble in what she calls business, must take its result, and cannot shelter herself under the privilege that she was a woman, and knew nothing of business. 3. She did not purchase this check, which is the only excusable case in which any rule of value can be invoked for her protection, nor did she loan on it, because she loaned on the obligation of a third party, and the assurances of a friend who acted as the go-between.

By the Court, BRADY, J. The view adopted on the trial of this action seems to have been, that the check in judgment of law was dishonored at the time of its transfer to the plaintiff, and therefore subject to all the equities existing in favor of the owners at the time it was stolen. The check is dated 21st of Jan. 1865, drawn by M. Morgan's Sons, payable to their own order and indorsed by them. It was, on or about that date, accepted by the defendants and not only certified to be good, but registered. On the 4th of February, 1865, it was in the

possession of the firm of Meyer & Greve of this city, and on that day stolen from their book-keeper. It appears that notice of the theft was given to the defendants, or the payment of it stopped, on the same day, and that nothing further was heard of it by Meyer & Greve until May or June of 1868. The circumstances disclosed seem to establish that the check was designed for circulation, and not for immediate payment by the defendants. It was in the hands of Meyer & Greve as late as the 4th of February, but it does not appear in what manner they obtained it. Whether it was passed to them by the drawers or reached them through a line of holders does not appear. The plaintiff gave value for it, and took it in a legitimate manner. Regarding it as worth its face and desirous of investing her money, she made the only inquiries which she was called upon to make, before accepting it. If the signatures to the check and certificate were genuine, she was not bound by anything appearing upon the face of it, to exercise any other caution, vigilance or diligence, so far as the defendants were concerned. They had appropriated the funds to pay the check. It was in fact paid by the drawers because the certificate and registry was not only a debit against their account and a withdrawal of its amount from their funds, but an appropriation of such sum for the holder, whoever he might be. The check was honored, therefore, because it was accepted, and so far as the drawers were concerned, was by such acceptance paid. If the holder after acceptance and certification delayed presentation for payment, it was to his prejudice only. He might lose the interest which he could have made by proper investment, but whether he thought such a result judicious or not, was a matter resting entirely within his own power or discretion. The proposition, therefore, that from the delay in presenting it for payment, it might be deemed dishonored like a promissory note payable on demand is utterly untenable.

Nolan v. Bank of New York National Banking Association.

ble. The answer to it is that the check was not dishonored ; on the contrary it was paid by the drawers by an absolute appropriation of their funds to meet it, which the defendants held for the transferee, whoever he might be. No element of this kind marks the circulation or transfer of the promissory note which has not been paid, and for which no fund has been specially created. We were not referred to any case maintaining the proposition stated, and none has been found. The certificate "imports that the drawer has funds or means convertible into funds, in the hands of the drawee, at the time, which shall be retained and devoted to the payment of the paper on presentation. If it does not mean this it is a sham and a snare." *BROWN, J., in Farm. and Mech. Bank v. B. and Drov. Bank* (28 *N. Y. Rep.*, 428,) says: "Unless the word good, as said in *Massey v. The Eagle Bank*, (9 *Metcalf*, 309,) carries with it a binding evidence of the fact that the money is in the bank to meet that particular check, and that it will be paid to bearer at any time when presented, it is of no practical utility."

"Checks drawn upon banks or bankers thus marked and certified enter largely into the commercial and financial transactions of the country. They pass from hand to hand in the payment of debts, the purchase of property, and in the transfer of balances from one bank to another. In the great commercial centres they make up no inconsiderable portion of the circulation, and thus perform a useful, valuable, nay, an almost indispensable office." These are views also expressed by *BROWN, J.*, in the case (28 *N. Y.*) above cited, and are utterly inconsistent with the proposition that checks may not at any time during the running of the statute of limitations be employed in the manner indicated. Chief Justice *DENIO* (14 *N. Y. Rep.*, 624,) said: "The object of a dealer, in procuring his check to be certified, is to enable him to obtain credit with others who might not be willing to

Nolan v. Bank of New York National Banking Association.

trust to his personal representations of the existence of funds to meet the draft, or his assurance that he would not withdraw them to the prejudice of the holder. This effect belonging to certified checks enables them to be extensively used in payments and settlements at the place where they are drawn and, to a more limited extent, as remittances to other places." The character thus assigned these instruments, makes them in effect a circulating medium capable of being passed from hand to hand by delivery and chiefly upon the credit of the bank as primary liable. And hence lies the difference between them and inland bills of exchange which, for the purpose of charging the various parties, they are considered to resemble. The object of certifying the check is to give it currency—is to induce third persons to accept it freely as they would bills of the bank; and hence it does not lie with the bank to assert that though the bill was good on the day it was certified, it has since become worthless by the withdrawal of the drawer's funds. Unless the certificate be treated as a compact or agreement that the check shall be paid, it fails to answer the purpose for which it is sought and given. (*Edwards on Prom. Notes and Bills*, 406, 407.)

"The sole and manifest object of the maker or holder of a check, in requiring it to be certified, is to enable him to use it as money." (*Per Oakley, J., in Willetts v. The Phoenix Bank*, 2 *Duer*, 121;) and again he said: "The certificate is a useless form unless it means, not merely that the check was good when certified, but that it will be good when presented for payment. * * * The obligation of the bank is simple and unconditional, to pay upon demand, and in all such cases the demand may be made whenever it suits the convenience of the party entitled to the stipulated payment." The certificate is to be regarded as an acceptance payable on demand, and was obligatory until paid or the statute of limitation should attach as a bar. (*Mead v. Merchants' Bank of*

Nolan v. Bank of New York National Banking Association.

Albany, 25 *N. Y.*, 150. 16 *N. Y. Rep.*, 128, *per Wright and Selden, Justices.*) The effect of those cases is, that the bank becomes the party dealing with the holder, being primarily liable; and if the bank has no valid defence the holder must recover. The question of equities between any of the prior parties cannot intervene against a *bona fide* holder for value. He deals upon the paper alone, looking to the bank as the primary, and, in most instances, the only reliable debtor. It is the financial character of acceptor that enters into the purchase or acceptance of the check, and its assumed ability to pay, which does not exist with reference to individuals.

The result is, in regard to this case, that the learned justice erred in deciding that the plaintiff was not entitled to recover because the check was in judgment of law dishonored. An acceptor is not discharged by the bill not being presented for payment for three or four years after it becomes due; he is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him. (*Farquhar v. Southey*, 2 *Carr. & P.*, 497. *Dingwall v. Dunster*, *Doug.*, 247. *Story on Bills*, § 252.) The acceptor of a bill or note always remains liable. The acceptance is proof of his having assets in his hands, and he ought never to part with them unless he is sure that the bill has been paid by the drawee. He may, however, be relieved by the statute of limitations, as already suggested. As between the holder and the bank, the acceptance renders the latter the primary debtor, and the cases relating to the duty to demand payment in a reasonable time become inapplicable. These cases govern the relation between the holder and drawer. (*Little v. Phenix Bank*, 2 *Hill*, 429. *Willets v. The Phenix Bank*, *supra*. *Farm. and Mech. Bank of Kent v. B. and Drov. Bank*, 4 *Duer*, 219.)

The check having been stolen, it became the duty of

Hamersley v. Mayor &c. of New York.

the plaintiff to establish that she was a *bona fide* holder for value, and upon that question she asked to go to the jury, which was denied. There was evidence on that subject which was independent of that of the witness Crane, and that of the plaintiff, which was stricken out; and the refusal to submit the question was in accordance, no doubt, with the view entertained by the learned justice and already suggested—that the check was overdue and taken subject to existing equities. For these reasons the plaintiff was prejudiced, and a new trial should be granted.

Ordered accordingly.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1878.
Ingraham and Davis, Justices.]

A. GORDON HAMERSLEY and JOHN W. HAMERSLEY vs.
THE MAYOR &c. OF THE CITY OF NEW YORK.

Where land has been taken by the corporation of New York for the extension of a street, under the act of 1818 (*Laws, chap. 210*), and the damages of the owner have been assessed, and the owner allowed to remain in the possession and enjoyment of the premises, and to collect the rents, until actual possession was taken by the corporation, such continued possession and use of the premises are to be deemed equivalent in value to the interest on the award. Hence no action will lie against the corporation, to recover such interest. MULLIN, P. J., dissented.

The absolute requirement under the act of 1813 (*Laws, chap. 86*.) to pay the award *within* four months from the confirmation of the report is, by the act of 1818, changed to an obligation to pay four months *after* the expiration of the time appointed for carrying the improvement into effect. Until the arrival of the time appointed, or the expiration of the fifteen months, the possession, use and enjoyment of the lands are to remain undisturbed in the former owner and his tenants. There is no constitutional or other difficulty in carrying out this system. *Per DAVIS, J.*

A PPEAL, by the defendants, from a judgment at the circuit, in favor of the plaintiffs.

Hamersley v. The Mayor &c. of New York.

The common council of the city of New York, in March, 1865, presented a petition to this court, praying for the appointment of commissioners to estimate and assess the damages sustained by owners and other persons interested in certain lands proposed to be taken for the purpose of extending Church street in said city. Such proceedings were had in this court, on the petition, that commissioners were appointed to assess said damages, and they made an estimate and assessment of such damages, in and by which they assessed the damages sustained by the plaintiffs, by reason of taking their land, at the sum of \$93,180. The report of the commissioners was confirmed on the 30th of December, 1867.

On the 7th of December, 1868, the plaintiff presented to the common council a petition praying for the payment of the said damages, with interest from the 7th of January, 1868, the day on which the report was filed; but the same were not paid until the 12th of June, 1869.

The plaintiffs demanded the payment of interest on said damages from the expiration of four months from the confirmation of said report. This the defendants refused to pay. The plaintiffs received the amount of damages awarded. And it was conceded by the counsel that in the receipt for the damages the plaintiffs expressly stated they did not waive their claim for interest.

It was proved, on the trial, that the interest on the damages awarded to the plaintiffs from the 7th of December, 1868, when the petition was presented to the common council, until the 2d of June, 1868, was \$3,274.98, and that the interest on that sum from the 12th of June, 1868, until the trial, was \$160.95, making, in all, \$3,435.98.

The defendants' counsel moved to dismiss the complaint, upon the following grounds:

1st. That no proper demand of the sum awarded had been made.

Hamersley v. The Mayor &c. of New York.

2d. That the plaintiffs having received the principal of the sum awarded, could not maintain an action to recover the interest.

3d. That on the facts proved, the plaintiffs were not entitled to recover.

The motion was denied, and the plaintiffs' counsel excepted.

The defendants put in evidence a resolution passed by the common council and approved by the mayor on the 13th of March, 1869; and that the actual opening of Church street took place on the first day of March, 1869.

The defendants offered to prove that the plaintiffs remained in the possession, and had not been disturbed in the use and enjoyment, of the premises for which the award was made, down to and including the time when the aforesaid principal was paid, and also down to the 13th of March, 1869. The plaintiffs objected to the evidence. The objection was sustained, and the defendants' counsel excepted.

The defendants' counsel renewed his motion to dismiss the complaint, on the grounds above stated and on the further ground that by the resolution of the common council the street was not opened until the 1st of March, 1869, and the damages did not become due until that time, and that on the whole case the plaintiffs could not recover.

The motion was denied, and the defendants' counsel excepted.

The court directed a verdict in favor of the plaintiffs for \$3,435.98. To which ruling and direction the defendants' counsel excepted.

A. J. Vanderpoel, for the appellants.

John E. Parsons, for the respondents.

Hamersley v. Mayor &c. of New York.

DAVIS, J. By the statute of April 9, 1813, sec. 178, the corporation of the city of New York became seised in fee of lands taken for streets on the confirmation of the report of assessment of damages, &c., and were authorized "at any time or times thereafter to take possession of the same or any part or parts thereof without any writ or proceeding at law for that purpose." Under that statute the corporation were required within four calendar months after the confirmation of the report, to pay the awards, and if not paid, the parties in whose favor they were made were authorized at any time after application for payment to sue for and recover the same, with interest from the time of the application. The rights and remedies of the respective parties under this act were very simple and plain. The title vested in the corporation on confirmation of the report, and the immediate right of possession, and the power to take and exercise it at the pleasure of the corporation, were also given. The duty to pay *within* four calendar months was imposed, and the right to bring suit after application for payment and after the expiration of the four months, was conferred wholly independently of the action of the corporation in taking or omitting to take possession of the property. But this system was obnoxious to serious objections, for if one owner of the lands so taken was able to tie up the proceedings of the city by litigation, every other owner could at the end of four months demand and sue for his award, with interest, and at the same time keep his enjoyment of the premises, in some instances, for lengthy periods. Such or similar evils led to an amendment of the law. The act of 1818 (*Laws of 1818, p. 196*), was intended, I think, to make an important change in the system created by the act of 1813, and to relieve the city from some of the evils attendant upon that act. As I understand it the act of 1818 expressly clothes the corporation with authority to "suspend the

opening, extending, enlarging, altering and improving of any street, road, avenue or public place which may be ordered to be opened, extended, enlarged or altered in said city, in pursuance of the provisions" of the act of 1813, "for such time or times as they shall think proper, not exceeding fifteen months in the whole, after the confirmation of the report of the commissioners of estimate and assessment;" and it provides further, that the corporation shall not be required to pay any sums of money which may be awarded to any person on account of the opening, &c., "until the expiration of four months after the expiration of the time or times which may be appointed by them as aforesaid for carrying the said improvement into effect."

The most sensible construction, as it seems to me, of this section is, that the corporation, after the confirmation of the report of the commissioners of estimate and assessment, are to appoint by some affirmative action, a time or times for carrying the improvement into effect; that this appointment must be made within fifteen months at most, and until the time fixed by such appointment, the proceedings are suspended, and the fee and right of possession are taken subject to such suspension and the restriction it imposes upon the authority to enter upon and take actual possession of the lands. The absolute requirement under the act of 1813 to pay *within* four months from the confirmation of the report, is changed to an obligation to pay four months *after* the expiration of the time appointed for carrying the improvement into effect. Until the arrival of the time appointed or the expiration of the fifteen months, the possession, use and enjoyment of the lands are to remain undisturbed in the former owner and his tenants.

And I see no constitutional or other difficulty in carrying out this system. Every man whose lands are to be appropriated for a street has notice, upon the face of

Hamersley v. Mayor &c. of New York.

the statute, that the city, at some time within fifteen months after the confirmation of the report of the commissioners may by appropriate action designate a time "for carrying the improvement into effect;" that until the time so designated, or until the expiration of fifteen months, his possession and enjoyment of the property are to be undisturbed; that at the expiration of such time the city is at liberty to take possession and proceed with the improvement, and that upon the expiration of four months after the time fixed he is entitled to payment of his award. The two statutes, collated and modified, as the former must be by the latter, produce a system easily understood and executed, applicable to all cases and working as little harm and injustice to either party as perhaps is practicable in such cases.

It is upon this view of the law, I think, that the cases already decided have a strong and reasonable foothold.

In *Strang v. The New York Rubber Co.* (1 *Sweeney, Sup. Court Rep.*, 78) it was held that the fee of the lands taken under these statutes does not pass to the corporation until the expiration of fifteen months from the confirmation of the report, unless some affirmative act be done indicating a different time for the succession, and therefore the lessor, during that period, may recover the rent of the premises from the lessee, if the latter continue in occupation. In *Detmold v. Drake* (46 *N. Y.*, 318) the right to recover under the same circumstances, of a lessee, was affirmed, and the court substantially held that the fee of the corporation is subject to the right of the owner to occupy till the expiration of the fifteen months, or the time fixed for the actual opening of the street.

It is urged that unless the time "for carrying the improvement into effect" be fixed by the corporation within four months after the confirmation of the report, the right of the owner of the land to immediate payment of his award becomes vested, and cannot be

Hamersley v. Mayor &c. of New York.

affected by any subsequent action of the common council ; but this suggestion is of no force if the statute of 1818 has the effect to modify and change the act of 1813 as I have suggested. Of course, there may be hardships in given cases, in applying the statute as thus construed ; but it is difficult to avoid them under any construction. A uniform and well defined rule is the best for all parties ; and one which makes the city pay interest upon an award for premises, of which, during the time claimed for, the owner has the undisturbed enjoyment and possession, is likely to be more unjust than the presumption which the statute makes that the continued use is equal in value to the interest on the award.

I am of opinion that the judgment should be reversed, and a new trial ordered with costs to abide the event.

FANCHER, J. Conflicting opinions have been expressed as to the law relative to the opening and widening of streets in the city of New York.

It seems difficult to harmonize the statutes of 1813 and 1818. But in view of what has been decided, and especially in view of what has been held by the Court of Appeals, I suppose it is not strictly true that the confirmation of the report of the commissioners for widening Church street had the effect, as declared by the act of 1813, immediately to divest the owner of his title and right of possession ; nor did such confirmation abrogate, from that time, the leases between him and his tenants. Those consequences would have followed had it not been for the act of 1818. By force of the latter act, however, a new principle was introduced, and the widening was "suspended" for nineteen months from the confirmation of the report ; provided that, before the end of that period, the corporate authorities took no active measures to proceed with the widening, and did not enter into possession of the premises.

Hamersley v. Mayor &c. of New York.

While they refrained from doing so, the possession was lawfully retained by the owner, and all the fruits of the possession belonged to the owner, during such suspension. He could waive all objection as to the unconstitutionality of the act of 1818, and accept its benefit; retain his rights as owner and landlord, and *even sue for the rent upon the leases existing at the confirmation of the report*. In such actions the landlord could recover of his tenants, provided they continued to occupy the premises, for the rent which accrued up to the time the corporation took possession, but not beyond the end of nineteen months from the confirmation of the report of the commissioners. (*Detmold v. Drake*, 46 N. Y., 318.)

Such was the case here. The plaintiffs, as owners of the premises, availed themselves of the *benefits* afforded by the act of 1818. They waived any objection to the unconstitutionality of that act; assumed the validity of the privilege of suspension granted by it to the corporation; continued in possession of their premises and exercised their rights as landlords, by collecting rents from their tenants, for some time subsequent to the confirmation of the commissioners' report. The award in their favor was in contemplation of law the value of their premises, including interest, to the end of four months from the confirmation of the report.

The question now arises between them and the city, whether they shall have the land and the fruits of its possession under the act of 1818, and at the same time be paid for the value of the land with interest on such value after said four months, under the act of 1813, just as if no act of 1818 existed?

That would be to adjudge them entitled to the award and interest under the act of 1813, and at the same time to the incidental benefits of the "suspension" under the act of 1818.

Equity would seem to require that if they, by strict

Hamersley v. Mayor &c. of New York.

right and on constitutional grounds, are to be paid for their land under the act of 1813, when it appears they were not, according to that act, deprived of possession, on confirmation of the report, but were allowed the benefits of continued possession under the act of 1818, then they should in justice give credit to the city for whatever sums they have received for rent under the aid of the act of 1818.

I do not suppose the plaintiffs desire to stand upon both statutes, claiming the benefits both of the one and the other; for the two positions are inconsistent, and incompatible with justice. The course they have pursued has been to claim and retain the possession of the premises, and, as owners, to collect the rents, until the actual possession was taken by the corporation. I agree with Mr. Justice DAVIS that the statutes make the continued possession and use of the premises equivalent to the interest on the award.

The judgment should, therefore, be reversed, and a new trial ordered, with costs to abide the event.

MULLIN, P. J., dissented.

Judgment reversed, and new trial ordered.(a)

FIRST DEPARTMENT, GENERAL TERM at New York, November, 1878.
Ingraham, Fancher and Davis, Justices.]

(a) Affirmed by Court of Appeals. 56 N. Y., 533.

WIGHTMAN, *plaintiff in error*, vs. THE PEOPLE,
defendants in error.

A prisoner under indictment can admit, as testimony to be considered by the jury, on the trial, depositions of non-resident witnesses, taken prior to the trial, or *de bene esse*, by his consent and in his presence.

Where the prisoner, both before and at the trial, consented that depositions so taken should be read in evidence on the trial; *held* that such consent was a waiver of more formal proof, and was binding upon the prisoner.

ERROR to the Court of General Sessions of the city and county of New York, to review a judgment of conviction for grand larceny.

By the Court, BRADY, J. The plaintiff in error was indicted for grand larceny, and convicted. On the trial the only exception taken was to the following question: "State whether the prisoner, Wightman, said anything to you as to being in company with David C. Hill at Cortland street on the night in question?" This inquiry was in rebuttal, the plaintiff in error having sworn that he was not at the ferry at the foot of Cortland street where the crime was alleged to have been committed; and it is conceded that if that be any evidence in the case imputing crime to him the exception is valueless. The evidence upon which the people mainly relied was that of David C. Hill and Richard S. Wilson, both of whom were examined prior to the trial, or *de bene esse*, and whose depositions were taken before Roswell W. Jerome, a notary public of this city. The examination of these witnesses was thus taken because they were not residents of this state. It was conducted in the presence of the plaintiff in error, and a cross-examination of one made on his behalf. It is insisted that these depositions could not be received as evidence, although it was agreed that they should be read at the trial, and notwithstanding that at the trial they were read by consent of the counsel of the plaintiff in error and, of course, in the presence of the latter. It is supposed that the ruling

Wightman v. The People.

in the case of *The People v. Cancemi* (18 N. Y., 128) has some bearing upon this question, but it has not. The objection there was to the constitutional organization of the court by which the prisoner was tried, and it was determined that there being but eleven jurors there was a failure of jurisdiction, which could not be supplied by the consent of the prisoner. He could not confer it. In the case of *Maurer v. The People* (48 N. Y., 1) it was held that instructions given to the jury by the presiding justice, in the absence of the prisoner, was error, although his counsel was present consenting; but it was upon the ground that the statute declares that no person indicted for any felony can be tried unless he be personally present during such trial, and that "during such trial" embraced all the incidents of such a proceeding, including the charge of the justice to the jury and the instructions given them subsequently. The court had not the jurisdiction, therefore, which authorized the act complained of to be done. In the case of *Cancemi* it was said, however, that by consent objections to jurors might be waived; the court might be substituted for triors to dispose of challenges to jurors; secondary in place of primary evidence might be received; admissions of facts allowed, and in similar particulars as well as in relation to mere formal proceedings generally, consent would render valid what without it would be erroneous. And it was further suggested that a plea of guilty, whatever the grade or degree of crime, would be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the prisoner. All these concessions involve the waiver of rights, but do not conflict with positive statutory enactments, or prohibitions of the constitution. If the prisoner can admit facts, or secondary in place of primary evidence, he can admit the deposition of a witness taken on his consent as testimony to be considered by the jury. The depositions

Wightman v. The People.

herein were, however, taken before a notary by consent, in the presence of the prisoner, and at the trial read by his consent. There is no prohibition of such a proceeding. The legislature has provided for the taking of the evidence, *de bene esse*, of witnesses who do not reside in this state, (*Laws 1844, p. 476, § 11; People v. Hadden, 3 Denio, 220,*) and the examinations under consideration were no doubt initiated under its provisions, but the formal compliance with its details dispensed with as a matter of convenience, for all parties. There is nothing, therefore, in principle against this mode of procedure, and no authority against its use has been produced. The *de bene esse* examination of witnesses is often very essential to the administration of criminal justice, and when done without compliance with the details of the statute, but by consent of the prisoner, it should not be disregarded. He may insist upon his rights, or waive them in this respect, if not before, certainly at the trial. On an indictment for perjury, it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with and part of the prosecutor's case admitted, but Lord Abinger said: "I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel." (*R. v. Thornhill, 8 C. & P., 575.*) In this case, as already shown, the consent was both before and at the trial, and doubtless in reference to the statute by which such a proceeding could have been taken. Whether, however, the statute was in contemplation or not, the consent was a waiver of more formal proof, and was binding upon the plaintiff in error.

For these reasons the judgment should be affirmed.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1873.
Ingraham and Brady, Justices.]

CRANE vs. ONDERDONK and others.

Although an agent, for nonfeasance and omissions of duty, is not liable, except to his principal, the rule is otherwise when the act complained of is misfeasance. In all such cases, he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another.

The plaintiff, at the solicitation of S., who was the owner of certain stock which he had transferred to V., to secure a debt, had agreed to furnish the money required to discharge such debt, and had made the necessary arrangements for an advance of the money to him by W. & S., and deposited with them securities for their protection. *Held* that this was a sufficient consideration for an agreement between him and V. by which the plaintiff was to pay him the amount of his claim against S., and that, upon such payment V. should assign the stock to the plaintiff, and transmit the certificates to some third person, who should deliver the same to the plaintiff on receiving from him payment of the amount due V.

V. transmitted such certificates to O., with the proper power of attorney, to transfer the stock to the plaintiff, and constituting O. his "agent and attorney in fact" to deliver such stock to the plaintiff on receiving payment of the amount due V. Subsequently, O. without the knowledge or consent of the other parties, caused a portion of such stock to be transferred to himself, and the remainder to F. The plaintiff tendered to O. the amount claimed by V., and requested a transfer of the stock to him. O. refused to accept the money and make the transfer, claiming that he and F. were the owners of the stock. *Held* that the plaintiff was the assignee of S.'s right of redemption, and that being ready to perform the duties devolving upon him, as such, he was *pro hac vice*, the owner, and possessed of all the rights of S. and entitled to enforce them.

Held, also, that O. having received the stock for the purpose of transferring it to such person as S. should designate, had, in causing the same to be transferred to himself and F. without the consent of S. or his appointee, transcended the power conferred upon him, and was guilty of misfeasance towards the owner of or person entitled to its possession.

Held, further, that O. being a wrongdoer, was not in a position either to dispute, or to interfere with, the plaintiff's rights. That he could not take advantage of any assumed defect in the plaintiff's title or interest; and that he having wrongfully converted the stock, and acted in contravention of his trust to V. and his *quasi* trust to S. and to the plaintiff whose interests he knew and disregarded, the plaintiff was entitled to relief against him; and that a judgment dismissing the complaint was erroneous.

APPEAL, by the plaintiff, from a judgment entered at a Special Term, dismissing the complaint.

Crane v. Onderdonk.

This action was tried at a Special Term of this court, in October, 1872, before Justice BARRETT. The defendants Onderdonk and Field are the only ones who answered or contested the action. No testimony was introduced by them on the trial.

The complaint alleges, and the plaintiff proved, the following among other facts: That in the month of February, 1871, one John Van Dyke, then residing at Wabasha, in the state of Minnesota, held 600 shares of the capital stock of the Ebervale Coal Company, of the par and actual value of \$30,000, as collateral security for balance of an indebtedness to him from Augustus T. Stout of New York city of about \$12,000, which stock Stout had a right to redeem; that Stout entered into an arrangement with the plaintiff Crane, by which he gave up to him this right to redeem said stock and take it up; that Crane arranged with the firm of Van Wickle & Stout, (composed of Van Wickle and G. Lee Stout,) for the money necessary to make such redemption; that Crane constituted the said Augustus T. Stout his agent to negotiate and arrange with Van Dyke for the redemption of the stock; that Crane, through his agent, Stout, arranged and agreed with Van Dyke, that he, Crane, should pay him the amount of his claim, and Van Dyke agreed that he would thereupon transfer said stock to Crane.

All the parties except Van Dyke resided in or near New York city. The negotiations for the above arrangement were carried on, and the agreement was made, by written correspondence with Van Dyke. Several letters relating to the transaction passed between himself and Stout and Onderdonk. Van Dyke's testimony was taken by commission, and he produced many of the letters written by or to him.

At the request of Crane's agent, Van Dyke agreed to, and did, transmit the certificates of stock to the defendant Onderdonk, for Crane, to be given to him on his

Crane v. Onderdonk.

paying the debt against Stout. Van Dyke accompanied the certificates with a blank power of attorney, and with instructions to Onderdonk to fill it out and transfer the stock to such person as Augustus T. Stout should name, on receiving from such person the amount of the indebtedness. Onderdonk wrote a letter to Van Dyke, after he received the certificates, acknowledging the receipt of them for the specific purpose in question. After he received the certificates from Van Dyke, he saw Stout, and was informed by him that the plaintiff Crane was the person who was to take up the stock. He was also informed by Stout that Crane had arranged with the firm of Van Wickle & Stout to advance the necessary sum for him to pay Van Dyke's claim, and that he, Stout, was authorized to act for Crane in the transaction. At the first interview which Onderdonk had with Stout, after receiving the certificates of stock from Van Dyke, he professed a willingness to carry out the transaction, but suggested, or agreed to a short delay, in order that some adjustment should be made of a claim for extra allowance, which Van Dyke thought he ought to have, and also of some alleged discrepancy in Van Dyke's account. Onderdonk received the certificates of stock about February 4th, 1871. On the 20th of that month, and while Stout and Van Dyke were endeavoring to effect the above adjustment, Onderdonk, without the knowledge or consent of any of the other parties, had 560 shares of the stock transferred to himself, and forty shares of it transferred to his sister, the defendant Sarah M. Field. On the 20th of February he wrote to Van Dyke that he had concluded to take the stock himself, and inclosed certificates of deposits, &c., to pay the same.

Van Dyke testified that he replied to that letter, saying to Onderdonk, that his taking the stock was satisfactory to him, provided it was assented to by Stout. Stout did not assent to it, but in behalf of the plaintiff Crane, at once tendered to Onderdonk the money he had

Crane v. Onderdonk.

paid Van Dyke, and demanded the stock. Onderdonk rejected the tender, and refused to transfer the stock, and claimed that he had become the purchaser and owner of the same.

The complaint alleges that Onderdonk had fraudulently made use of his position as custodian of the stock for delivery to the plaintiff, to convert it to his own use and to deprive the plaintiff of the value of the same, over and above the amount to be paid to Van Dyke, knowing that the plaintiff was ready and willing to pay, and for the purpose of securing to himself the profit of about \$19,300; and asks judgment that upon payment or tender of the amount of Van Dyke's claim, the defendants, Onderdonk and Field, assign the 600 shares of stock in question to the plaintiff, and also for an injunction, &c.

The judge decided that the allegations in the complaint were all true, and were fully proved, but that the plaintiff was not entitled to any relief whatever, and ordered judgment, dismissing his complaint without costs. He based his conclusions on the assumption that the plaintiff had no standing in court—that there was no such privity between him and Onderdonk as gave him any legal remedy.

S. W. Fullerton, for the appellant. I. It will not be disputed by any one but that the defendant Onderdonk was guilty of a flagrant, wilful conversion of the stock in question, and that he ought not to escape with the fruit of his wrong.

It is conceded on the part of the appellant, that if Onderdonk is to be regarded as the agent of Van Dyke only, and owed a duty to no one else, he cannot be made liable to any third person for mere nonfeasance or omission of duty in the course of his employment. But it is submitted that this is not the correct view to take of the case.

Crane v. Onderdonk.

In the first place it is well to observe the distinction between nonfeasance and misfeasance on the part of an agent.

In respect to nonfeasance, or mere neglects in the performance of duty, the agent is liable only to his principal. But for his own positive or wilful torts he is liable to third persons.

This distinction is observed in the case of *Gutchess v. Whiting*, (46 Barb. R., 139,) where the principal sent barley to his agent to sell for him, which he advised him was not *new* barley. The agent sold it to the plaintiff for seed barley, for which purpose, not being new, it was useless. The purchaser having sued the principal, and having failed to recover, brought an action against the defendant (the agent) for fraud, and the court held him liable as having acted *ultra vires*, and as having made himself the principal in the fraud.

In *Hecker v. De Groot* (15 How. Pr., 314,) Clerke, J., said: "The defendants are sued for damages occasioned by a fraud committed by them. It matters not in what capacity they acted, or with whom they co-operated. They were instrumental in perpetrating the acts constituting the fraud. If, indeed, a person is the unconscious instrument of others in committing an injury, he is not personally liable for the consequences; but where he knowingly engages in an unlawful cause, whether for his own immediate benefit or not, he cannot escape liability by showing that he acted as agent."

But it is hardly necessary to quote authorities to show that for mere neglect of duty an agent is answerable only to his principal; but for an unauthorized fraud, he, and not the principal, is liable.

It will be said, however, that Onderdonk practised no fraud or wrong upon Crane; for the reason that Crane was not the owner of, nor had any right to redeem the stock. The judge took this view of the case, and hence dismissed the complaint. We submit that it was incor-

Crane v. Onderdonk.

rect, and that an entirely different one should have been taken.

What is the plain truth of the case, as it was presented by the pleadings and proofs? It is simply this: Stout had the right to redeem the stock from Van Dyke. By his arrangement with Crane, he agreed with him that if he would pay his debt to Van Dyke he would surrender that right to him, and agreed with him that he might have and exercise it. Crane constituted him his agent to make the redemption. As such agent he corresponded with Van Dyke on the subject—named Onderdonk as the proper person to have the custody of the stock for delivery to Crane, on receiving from him the amount of Van Dyke's claim—that he and Van Dyke finally agreed that the stock should be placed in Onderdonk's hands for that purpose—that Onderdonk received it pursuant to this agreement, and under an agreement on his part with Van Dyke and Crane, that he would deliver the stock to Crane on receiving from him the sum of Van Dyke's claim, and would pay over to Van Dyke the said moneys when received—that Crane, by his agent, tendered the required amount to Onderdonk, and demanded the stock; but he refused to deliver it and fraudulently converted it to his own use, by having it transferred to himself and sister.

It is submitted that this is a proper view to take of the case. If so, it is not true that Onderdonk was the agent only of Van Dyke. By virtue of Stout's arrangement with Crane, the latter became entitled to demand and have the stock, on paying or tendering the debt due Van Dyke. By virtue of the agreement between Crane and Van Dyke, Onderdonk became the custodian of the stock for both. In other words, he became a party to an agreement with Van Dyke and Crane, that he would take, and hold, and deliver the stock and receive the debt. He received the stock for Crane, to be delivered up to him when Crane paid him the money. Having

Crane v. Onderdonk.

consented to become the custodian of the stock under the arrangement, he must be held to have agreed with both Van Dyke and Crane that he would deliver it on payment. He was, therefore, the agent of both the parties, and they all stood in such privity with each other, because of the entire arrangement, that it can be said that Onderdonk owed a legal duty to Crane. In fact it can be said, without any violence to the case, that the delivery of the certificates of stock to Onderdonk was, under all the circumstances, a delivery to the plaintiff, conditioned upon payment by him of the amount of the debt, and whenever he paid, or tendered the amount, his right to the stock was complete. Especially is this so, in view of the fact that neither Van Dyke or Stout have repudiated the arrangement, and both insist that Onderdonk shall deliver the stock to Crane, pursuant to the agreement.

II. It was not necessary Crane should have made Stout any written transfer of the stock, or of the right to redeem it, to entitle him to make the redemption. Crane had a mere naked right to redeem, not evidenced by any instrument of writing. If he had possessed such an instrument or obligation from Van Dyke, the mere delivery of it to Crane by him under a parol agreement that he should pay the debt and have the stock, would have passed to him the right to redeem. But having no such writing, he makes a parol contract with Crane, by which he agrees that if he will pay his debt to Van Dyke he shall have the stock. By this agreement he surrendered to Crane his whole interest in the stock and in the right of redemption. (*Hastings v. McKinley*, 1 E. D. Smith, 273. *People v. Tioga C. P.*, 19 Wend., 73. *Gram v. Cadwell*, 5 Conn., 489. *Runyan v. Mersereau*, 11 John., 534.)

The judge conceded that if Stout had brought the action, it would have been well brought. It is submitted that Crane succeeded to all Stout's right under and

Crane v. Onderdonk.

by virtue of the agreement between them, and having tendered the debt owing by Stout to Van Dyke, he entitled himself to the stock, and hence the action was properly brought by him.

III. Assuming that Stout had a legal remedy against Onderdonk, then he was entitled to seek it in the present form of action.

Smith & Woodward, for the respondents. I. The plaintiff has no standing in court upon which he could found a claim for the relief sought in the complaint in this action. The plaintiff, as the friend of A. T. Stout, was to furnish the money for Stout, to enable him to pay the indebtedness to Van Dyke, and to take an assignment of the stock as security for the money advanced.

II. The arrangement or agreement upon which this action was founded, purports to have been made between the plaintiff and John Van Dyke, as the principals, and by and through Augustus T. Stout, as the agent of the plaintiff, and Peter C. Onderdonk, one of the defendants, acting as agent for Van Dyke. It was a part of the arrangement that the certificate of the stock was to be transmitted to some person near New York, who should transfer and deliver the same, and receive the money for Van Dyke; and the complaint expressly alleges, that Van Dyke constituted Onderdonk his agent and attorney in fact, to deliver the stock with the proper transfer, and receive payment of the money due to Van Dyke; and that the defendant Onderdonk had fraudulently made use of his position as the agent and attorney in fact of Van Dyke. If the plaintiff has a cause of action against any one, it is not against the defendant Onderdonk, but against John Van Dyke. Onderdonk was not the agent of the plaintiff, and owed him no duty. He was the agent of Van Dyke, and for a neglect to discharge his agency he is amenable to his principal,

and to no one else. If third persons are injured by the neglect of a known agent, the rule is *respondeat superior*, and their remedy is against the principal and not the agent. (*Denny v. The Manhattan Company*, 2 Denio, 115; affirmed 5 Denio, p. 639. *Phinney v. Phinney*, 17 How. Pr. R., 197.) In *Colvin v. Holbrook*, (2 N. Y., 126,) Justice Gardiner, at page 129, says: "It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible." And after citing authorities, adds: "The question must be deemed at rest in this state by the decision in *Denny v. The Manhattan Co.* (2 Denio, 118;) affirmed in the Court for the Correction of Errors."

The agent is not, in general, liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; but the privity exists only between him and his principal. (*Story on Agency*, sections 308, 309.) The principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him, through the instrumentality of agents. (*Story on Agency*, § 452.)

III. The position taken by the plaintiff's counsel, on the argument of this case at Special Term, that Onder-

Crane v. Onderdonk.

donk was the agent of the plaintiff, cannot be maintained. It is nowhere in the complaint alleged that he was the agent of the plaintiff, and there is no evidence in the case to establish such a position; on the contrary, as shown in the first point, Onderdonk is expressly made the agent of John Van Dyke, and of no one else.

By the Court, BRADY, J. The plaintiff in this action was not entitled to the stock held by Van Dyke, until the amount for which he held it as collateral was paid. Onderdonk, to whom Van Dyke sent it for delivery to the person paying the lien upon it, converted it to his own use before any payment was made, advising Van Dyke that he had thus taken it, and remitting payment of the debt due the latter. Onderdonk, having received the stock for the purpose of transferring it to such person as Stout designated, transcended the power conferred upon him, and was guilty of misfeasance towards the owner of, or person entitled to, its possession. Although an agent, for nonfeasance and omissions of duty, is not liable, except to his principals, the rule is otherwise when the act complained of is misfeasance. In all such cases he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another. (*Story on Agency*, § 311, and cases cited. *Hecker v. De Groot*, 15 *How. Pr. Rep.*, 314. *Gutchess v. Whiting*, 46 *Barb. R.*, 139.) The question presented, and upon which the success of the appellant here depends, is, therefore, whether the plaintiff acquired, by his agreement with Stout and subsequent arrangement relative thereto with Van Dyke, any title or interest in or to the stock which enables him to maintain this action. It appears that he had, at the solicitation of Stout, agreed to furnish the money necessary to discharge Van Dyke's debt, and

Crane v. Onderdonk.

had made the necessary arrangements for the advance of the money to him by Van Wickle and Stout, and by depositing with them securities for their protection. This was a sufficient consideration for the agreement between him and Stout. (*Story on Contracts*, § 431, and *cases cited*—although the consideration was not disputed between them.) And the agreement thus made was ratified by the employment of Stout as his agent to obtain the transfer of the stock, which the latter proceeded to do. Stout never questioned the right of the plaintiff to the transfer. On the contrary he was desirous that it should be made, and the fund to accomplish it, and for which the plaintiff had provided, was awaiting an adjustment of the sum due from Stout to Van Dyke. All this was well known to the defendant Onderdonk, with whom, as the representative of Van Dyke, the negotiations were carried on. It also appears that an amount sufficient for the purpose was tendered by the plaintiff to Onderdonk and the stock demanded, but the money was not received, and the stock was not transferred or delivered. It is true that this incident was subsequent to the appropriation of the stock by Onderdonk; but it was, with the exception of forty shares, in his possession, and the latter doubtless under his control. The result of these facts and conclusions is that the plaintiff was the assignee of the right of redemption, and ready to comply with the duties which devolved upon him in virtue thereof, which the pledgor assisted him in discharging. He was therefore, *pro hac vice*, the owner. He possessed all the rights of Stout, and was endeavoring to enforce them. The defendant Onderdonk was not in a position either to dispute or to interfere with them. He could not take advantage of any assumed defect in the plaintiff's title or interest, in the face of the fact that the actual owner and the latter were acting in concert and for a lawful purpose. The right of Stout to remove the stock, to change its custody

Crane v. Onderdonk.

on the payment of the lien upon it, was unquestionable, and the attempt to interfere with the exercise of such a right would be wholly unwarranted. The equitable interest in a judgment may be assigned by a delivery of the execution. (*Dunn v. Snell*, 15 *Mass.*, 481.) The equitable interest in a chose in action may be assigned, for a valuable consideration; and it is not necessary that the assignment should be in writing. (*Parsons on Cont.*, vol. 1, p. 197, and cases cited.) And if the person seeking to enforce a demand have the legal or equitable title, if he have the whole interest, he may maintain an action. (*Hastings v. McKinley*, 1 *E. D. Smith*, 277.) The assignment was accompanied by a delivery to the plaintiff of the evidence of the contract between Van Dyke and the assignor, so far as it could be. The correspondence between Van Dyke and Stout furnished the proof of the possession of the stock by the former as collateral, and his assent to the transfer in accordance with the arrangement made by the latter; and this was equivalent to the delivery of an execution or contract.

The conclusion which must follow these views is, that the dismissal of the complaint was erroneous. The defendant Onderdonk was a wrongdoer, and was not, under the circumstances, in a position, as already suggested, to question the plaintiff's right. He had acted in contravention of his trust to Van Dyke and his *quasi* trust to Stout and to the plaintiff, whose interests he knew and disregarded.

I think the judgment should be reversed.

Judgment reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1873.
Ingraham and Brady, Justices.]

HALLGARTEN and others vs. ECKERT and others.

In an action upon a promissory note made by E. & W. to the order of A. & Co., and by them indorsed and sold to the plaintiffs, the answer alleged that the note was made without consideration, to enable the payees to procure the same to be discounted for their benefit by H., but that the same was misapplied by a sale thereof to the plaintiffs at a usurious rate. On the trial, the question, "What was the discount?" was objected to, and the evidence excluded. *Held*, that if the objection was cured by the subsequent statement of the witness that the amount to be taken from the note, he thought, was 24 per cent. per annum, then the usurious rate was established. That if it was not cured by reason of the indefinite character of that testimony, then the exception remained intact, and was fatal to the validity of a judgment in favor of the plaintiffs.

Held, also, that taking either view of the case, a judgment for the plaintiffs could not be maintained; it being an essential element of the defence that a greater sum than that allowed by law was agreed to be paid and received, and the question excluded being designed to elicit the proof.

That there was no necessity for requesting the judge to submit any question to the jury. That assuming the proof to have been that 24 per cent. per annum was paid for the discount, then the defence was made out; and if there was no proof, then the exception was well taken, and was controlling.

APPEAL by the defendants, Eckert & Winter, from a judgment entered on the verdict of a jury.

The action was brought on a promissory note, made by the defendants, Eckert & Winter, to the order of Altenbrand Brothers, and by them indorsed and sold to plaintiffs. The defendants, Eckert & Winter, were alone served with process, although the Altenbrands were nominal parties. The answer alleged that the note was made without consideration, to enable the payees to procure the same to be discounted for their benefit, by Joseph Hillenbrand, but that the same was misapplied by sale to the plaintiffs at a usurious rate, the plaintiffs deducting and receiving \$300 for the period of such note. The cause was tried at a Special Circuit in January, 1873. The defendant Winter having testified to the origin of the note, and the terms on which it was given, the defendants rested, when the court ruled that these facts did not constitute a defence. The defendants excepted. Henry

Hallgarten v. Eckert.

Altenbrand, one of the payees, then corroborated the testimony as to the origin of the note, and testified that he sold it to the plaintiffs at the rate of 24 per cent. per annum. No other testimony was given.

The court ordered a verdict for the plaintiffs, upon the ground that the defendants had not established the usury as alleged in the answer. The defendants excepted. The jury rendered a verdict in favor of the plaintiffs for \$5,047. The other exception was to the exclusion of the question, "What was the discount," asked of the witness Altenbrand.

The legal *interest* for the whole period would have been \$137.08. At the rate of 24 per cent. the amount was \$479.64.

Jacob A. Gross, for the appellants.

John K. Porter, for the respondents.

By the Court, BRADY, J. The defendants, Eckert & Winter, made their note to the order of the defendants, Altenbrand Brothers, for the accommodation of the latter, and it was passed to the plaintiffs in the course of business. The plaintiffs are brokers and bankers, and Altenbrand Brothers were in the habit of procuring from them discounts of regular business paper, delivering large amounts thereof at a time, and receiving advances upon or discounts of it, as the case might be. The defendant Altenbrand, who was examined as a witness, said: "They would, as quick as the paper was disposed of or discounted, send me a statement at a certain rate." The plaintiffs claimed to be the owners of the note in suit, and from the course of business adopted between them and Altenbrand Brothers, had evidently acquired it by discount, not by advance, although it would make no difference, unexplained, if at all, whether it was obtained by advancing money upon a usurious agreement or discounting it upon a similar understanding. The

plaintiffs thus asserting the ownership of the paper, and it being without consideration between the original parties, it became important to the defence of usury interposed, to show at what rate the discount was made ; and hence the question, "What was the discount," which was objected to, and excluded, and exception taken. If the objection be held to be cured by the subsequent statement of the witness that the amount to be taken from the note, he thought, was 24 per cent. per annum, then the usurious rate was established. If it was not cured by reason of the indefinite character of that testimony, then the exception remains intact, and is fatal to the validity of the judgment. It was an essential element of the defence that a greater sum than that allowed by law was agreed to be paid, and was received, and the question excluded was designed to elicit the proof. It seems, therefore, that taking either horn of the dilemma, the plaintiffs cannot maintain this judgment. It does not affect this view that the defendants did not request the presiding judge to submit any question to the jury. There was no necessity to make such a demand ; for assuming the proof to be that 24 per cent. per annum was paid for the discount, then the defence was made out ; and if there was no proof, then the exception mentioned was well taken, and is controlling. The judgment, for these reasons, must be reversed and a new trial ordered, with costs to abide the event.

New trial ordered.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1873.
Ingraham and Brady Justices.]

GILMORE and others *vs.* CROWELL & FISHER.

The general rule is that the contract of a surety is to be construed strictly, and not to be extended beyond the fair scope of its terms. By that rule, the obligation of parties executing an undertaking for the discharge of an attachment is to be ascertained and determined.

Where such an undertaking provided for the payment of the amount of the judgment which might be recovered against the defendants, and the judgment recovered was against some of them only; *held*, that the failure to recover against all the defendants did not prevent a recovery against the sureties, upon the undertaking.

The object or design of the statute, and the intent of the legislature, being considered, an agreement by the sureties in such an instrument, that they will pay any judgment obtained in the action, against all or any of the defendants, is fairly within the scope of the sureties' undertaking.

A PPEAL, by the plaintiffs, from a judgment entered at a Special Term, dismissing the complaint.

On the 6th of February, 1872, a suit being pending in this court, wherein these plaintiffs were plaintiffs, and Robert Patton, Willard Ginn and John B. Folger were defendants, and an attachment having been issued therein, the present defendants, Crowell & Fisher, for the purpose of procuring a discharge of such attachment, executed an undertaking, entitled in said action, in these words:

"An attachment having been issued in the above action to the sheriff of the city and county of New York, and the above named defendants having appeared in such action, and being about to apply to the officer who issued such attachment, or to the above mentioned court, for an order to discharge the same, we, Elisha Crowell, of No. 27 Lafayette avenue, in said city of Brooklyn, and Augustus G. Fisher, of No. 27 Lafayette avenue, in said city of Brooklyn, do hereby, pursuant to the statute in such case made and provided, undertake, in the sum of seven hundred dollars, that we will, on demand, pay to the above named plaintiff the amount of the judgment which may be

Gilmore v. Crowell.

recovered against the above named defendant in this action, not exceeding the above mentioned sum. Dated New York, February, 1872.

ELISHA CROWELL,
A. G. FISHER."

Thereupon the attachment was discharged, and the attached property was surrendered by the sheriff, under the order of the court.

That action proceeded until the 13th of July, 1872, when the plaintiffs had judgments against Patton and Ginn, two of the three defendants therein, for \$526.37.

This action was brought upon that undertaking. The judge at the trial dismissed the complaint, on the ground that the plaintiffs recovered against two only of the three defendants, and therefore there had been no breach of the condition of the undertaking.

Thos. H. Rodman, for the appellants.

Starr & Ruggles, for the respondents.

By the Court, BRADY, J. The question presented by this appeal is whether an action can be maintained against sureties upon an undertaking which provides for the payment of the judgment which may be recovered against the defendants, when the judgment recovered is against some of them only. The general rule is that the contract of a surety is to be construed strictly, and not to be extended beyond the fair scope of its terms, (*Cheesbrough v. Agate*, 26 Barb., 603; *Poppenhausen v. Seeley*, 3 Keyes, 150;) and by that rule the obligation of the defendants herein must be ascertained and determined.

The undertaking which they executed was, as declared by it, "pursuant to the statute in such case made and provided," and the design of the statute was to enable the defendant or defendants, in an attachment proceeding, to recover the property seized at once, on giving

Gilmore v. Crowell.

security to pay the judgment. The intent was to substitute a personal obligation of sureties for the property which could by the attachment proceeding be applied to the payment of the alleged indebtedness when established by due process of law — not to any particular judgment that might be obtained, but to any judgment rendered in the action, whatever it might be.

The seizure of the property of the defendants named, or either of them, would, to the extent of the value, insure the payment of the claim asserted; and when the defendants, to reclaim it, give the undertaking required, the presumption of its sufficiency to pay the entire debt is proper. The object or design of the statute, and the intent of the legislature being considered, the agreement seems fairly within the scope of the sureties' undertaking, that they will pay any judgment obtained in the action against all or any of the defendants.

It is through their instrumentality that the property applicable is diverted, and they should see to it that their indemnity shall rest upon more substantial ground than a limited or restricted liability.

The statute under which the undertaking was given, §§ 240 and 241, provides for an obligation to pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action; and it is evident that the contemplated benefit to the plaintiff was the payment of the judgment that he might recover. The defendants herein having assumed such obligation, the statute being within their knowledge and referred to in their agreement, must be regarded as having contracted with reference to its design and intent.

It becomes, therefore, legitimately an element in the consideration of the question of what was intended by the parties, and what is within the fair scope of the contract thus considered.

The case of *Kipling v. Turner* (5 B. & Ald., 261,) is

decisive of this question. The condition of the bond, in that case, was to pay, or cause to be paid, all such costs as the court should think fit to award to the defendants on the hearing of the cause, and it was held that the death of one of the defendants before costs awarded, could not be pleaded in discharge of the bond. BAYLEY, J., said: "The case is very different where persons are described by character and where they are described by name." In this case the persons are described by character. The obligation is to pay the judgment against the defendants in the action in which the undertaking was given, and two of them against whom the judgment was rendered are of that character.

Although the question is not free from doubt, in consequence of the strictness with which the contracts of sureties are construed, nevertheless, under all the circumstances, the failure to recover against all the defendants does not, from the nature and object of the agreement, seem to be an essential, indispensable prerequisite to the liability of the sureties. Such a construction, although it might be sustained on authority, should not be adopted. By holding the defendants liable, the substituted security is made available. The property seized could have been applied to the judgment obtained, for aught that appears, and the defendants should occupy the same relation to the plaintiffs.

I think the judgment should be reversed.

Judgment reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1878. *Ingraham and Brady*, Justices.]

SMITH vs. SONNEKALB & LIEB.

In an action for rent, the defence was, that the premises were destroyed, or rendered unfit for occupancy, by fire. It appeared that there was a sub-tenant of a part of the premises, whose tenancy had not expired. There was no proof that he had surrendered the premises to the lessees, or to the lessors, or consented that the former might surrender his term, as well as their own, to the latter. *Held* that under these circumstances there could not be a surrender of possession of the entire premises, by the lessees, so as to absolve them from payment of rent, under the act of 1860, (*Laws of 1860, ch. 345.*) That, to sustain the defence, it was incumbent upon the defendants to show a substantial surrender of the whole premises.

APPEAL, by the plaintiff, from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

The action was brought to recover rent of the defendants as assignees of a lease executed by West & Robeson of premises known as 21 Park Place, in the city of New York, to one Lewis A. Osborn. The defendants, on becoming assignees of the lease, assumed the payment of the rent reserved in the lease, and the performance of the covenants and agreements of Osborn, therein contained.

The defendants, by their answer, admitted the execution of the lease to Osborn, and its assignment to them, but denied the occupation of the premises. They alleged that the premises were destroyed by fire, or so injured by fire as to be untenable and unfit for occupancy; and that thereupon they quit and surrendered possession to the landlords, and had not since occupied the same.

On the trial it appeared that a fire had occurred in adjoining premises, by which the demised premises had been somewhat injured, some windows broken and the paint smoked and blackened, but the defendant Lieb testified that no part of the demised premises was burnt by fire. The defendants claimed, however, that the proof showed the destruction of the premises, for all purposes of occupancy or business. It appeared also that, at the time of the fire, part of the

premises were held by Lewis A. Osborn, under a sub-lease from defendants, and that his rent was paid in advance for several months. Also that the defendants never surrendered the premises to their landlord; that Osborn never surrendered; that after the premises were repaired, the defendants authorized their landlords to lease the premises on their account.

The judge charged the jury that the only two questions they had to consider were:

“First. Whether the building was so injured by the elements as to be untenable? The witness, Mr. Sonnekalb, and his partner, Mr. Lieb, say positively they were untenable, and they describe to you the condition of the premises after the fire. It is for you to determine whether they were or not.

The next question for you to consider is, whether they were surrendered? or, in other words, whether the lessors got possession of the premises? for that I hold to be the same thing. In my opinion it does not signify whether the lessee formally surrendered the premises, if the lessors got possession of the premises. It appears to me there is but little doubt about that; but it is for you to determine, because it is matter of fact. It appears by their own notice that they had a possession of about three months in repairing the premises. This notice was written in September, in which they state that the ‘premises now are in a fit condition for the tenant,’ so they must have been in possession of the premises to have them repaired.

On the other hand, the plaintiff shows that Sonnekalb, one of the defendants, authorized Mr. West to lease the premises, and West wished him to sign a paper to that effect, but Sonnekalb refused, and said he wished to see his lawyer first. That is not conclusive; still it is for you to consider how far it goes to contradict the testimony of the other side.

The amount of the rent from the first of June to the first

Smith v. Sonnekalb.

of November is \$833.33. The interest is \$17.65. Therefore, if you find for the plaintiff, your verdict will be \$850.98.

The plaintiff's counsel has also asked me to charge you—

1st. That unless the defendant surrendered possession of the premises to the lessors, West & Robeson, the plaintiff is entitled to a verdict.

I have already said all I intend to say on that subject ; that I think a formal surrender is not necessary if the lessors got possession of the building. (Plaintiff's counsel excepted.) 2d. That unless the sub-tenant Osborn surrendered possession, the plaintiff is entitled to a verdict. I say no to that. (Plaintiff's counsel excepted.) 3d. That if the defendant Sonnekalb authorized the plaintiff's assignors to relet the premises, the plaintiff is entitled to a verdict. I say no to that." (Plaintiff's counsel excepted.) The plaintiff's counsel also excepted to that portion of the charge in which the judge charged that it was not necessary to make a formal surrender of the premises, if the lessors got possession of the premises ; also to that part of the charge which stated that it did not signify whether the lessees formally surrendered the premises, if the lessors got possession of the premises. Also to that part of the charge which stated that the justice held it was the same thing, whether the premises were surrendered or the lessors got possession of them.

Under the charge of the court the jury found a verdict for the defendants.

A motion was subsequently made, upon the exceptions taken by the plaintiff, for a new trial, which was denied.

S. B. Brownell, for the appellant. I. The judge's charge and refusals, as excepted to, are erroneous. The defendants' defence arises under the statute of 1860,

which is as follows: "The lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied." (*Laws of 1860, p. 592, ch. 345.*) The statute is in derogation of the common law, and must be strictly construed. By the common law the total destruction by fire of a building did not affect the tenant's liability to pay, nor the lessor's right to recover, rent. This statute was enacted for the benefit and relief of a tenant, and put it in his power to decide whether he would put an end to his lease and term. After the injury the lessor can do no act, and make no decision. He is simply a passive and helpless spectator of the injury, and after such injury, unless the lessee quit and surrender possession, the lessor can take no possession and in no manner resume the premises. There are, therefore, two things which the lessee must do, if he decide it is for his interest and advantage to take the benefit of the statute. He must quit *and* surrender possession of the leasehold premises. The term surrender is well known to the law, and means a yielding up of an estate for life or years to him that hath the immediate estate in reversion or remainder. (4 *Kent*, 118, citing *Springstien v. Schermerhorn*, 12 *John.*, 357. *Schieffelin v. Carpenter*, 15 *Wend.*, 400.) Notwithstanding any injury to the demised premises, the lessee has the absolute right to retain the possession and the term, and to retain the term although he quit the possession. His quitting or abandoning the premises is not equivalent to surrender-

Smith v. Sonnekalb.

ing possession. The error of the judge's charge, and his refusal to charge as requested, confounded the two terms, and thereby misled the jury to the plaintiff's injury. There is no evidence whatever that the defendants surrendered possession to the landlord. On the contrary, it was shown that they never saw or communicated with the lessors for weeks after the fire, nor until the premises were fully *repaired* and the lessees authorized them to relet the premises on their account.

II. The defendants could not avail themselves of the statute. They had sublet a portion of the demised premises to Osborn, and had therefore put it out of their power to quit or surrender the premises. The plaintiff's request to charge, that unless Osborn, the sub-tenant, surrendered the possession of the premises, the plaintiff was entitled to a verdict, was correct, and the judge's refusal was error, for which the judgment should be reversed. The defendants' liability upon their lease was absolute, unless they proved their defence. The *onus* lay upon them to prove the surrender. It is clear that nothing was done or said, or could be said or done by the defendants, which gave to the lessors the right to the whole of the demised premises discharged of the lease under which Osborn held at the time of the fire. *Johnson v. Oppenheim* (12 Abb. Pr., N.S., 449,) is a decisive authority.

Chauncey Shaffer, for the respondents. I. The defendants' answer contains two valid defences to this action. 1. That Albert H. Smith is not the plaintiff in interest, but West & Robeson are. 2. The destruction of the premises by the element commonly called "fire," so as to be untenable and unfit for occupancy, and the quitting and surrendering of said premises by the defendants to West & Robeson.

II. The proof establishes both defences, and particu-

larly the second defence. (*Sess. Laws of 1860, p. 593, ch. 345.*) 1. The lessees left the key of the premises and quit possession thereof, and West & Robeson took the key and took possession of the premises, and have ever since kept both. It is true that after the latter had spent about three months, they tried to force the key and a new agreement back upon the defendants, but without success. (*Smith v. Devlin, 23 N. Y., 363.*) 2. West & Robeson will not be permitted to assert that they were trespassers and avail themselves of their own wrong. (1 *Greenl. Ev.*, § 435 and § 440, note 3, § 447. *Bird v. N. Y. Central R. R.*, 320. *De Witt v. Bailey*, 17 *N. Y.*, 340, 344. *Moorehouse v. Matthews*, 2 *id.*, 514, 616. *Robertson v. Knapp*, 35 *id.*, 91. *Seamans v. Smith*, 46 *Barb.*, 320. *Whitbeck v. N. Y. Central R. R.*, 36 *id.*, 644-8. *Polk v. Coffin*, 9 *Cal.*, 56. *Baltimore & Ohio R. R. Co. v. Thompson*, 10 *Md.*, 76. 1 *Smith's Lead. Cas.*, 286, note. 3 *Fairfield*, 222.)

III. No one of the plaintiff's exceptions is well taken.

By the Court, DAVIS, J. As the case appeared on the trial, we think it was incumbent on the defendants to show a substantial surrender of the whole of the premises. There was a total failure to show that Osborn, who was entitled to an office in the building, for which he had paid rent in advance for six months from the 2d day of April, 1868, to the defendants, had ever surrendered to them or to the landlords, or consented that the former might surrender his term as well as their own, to the latter. Osborn's tenancy had not expired when the repairs were completed. So far as the case shows, there was nothing to prevent him from claiming and enjoying the remainder of his term.

It was error, therefore, to rule as the learned judge did upon the question of his rights; and without pass-

Van Tuyl v. Westchester Fire Insurance Company.

ing upon the other questions in the case, we think there must be a new trial.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1878.
Ingraham and Davis, Justices.]

VAN TUYL and others vs. THE WESTCHESTER FIRE
INSURANCE COMPANY.

To warrant the court in reforming a contract, by inserting provisions that were omitted, or in correcting the same in any matter in which an error occurred, it must appear that such mistake was made by both parties. If one party was mistaken, and the other was not, no such judgment can be rendered.

This, like any other question of fact, is to be settled by the jury, or by the court if the action is tried without a jury; and where the evidence is conflicting, and contradictory, the finding at the trial is conclusive upon the parties.

In an action brought to reform a policy of insurance upon a mill, by inserting therein a permission to run the mill over time, or at night, and to recover thereon for a loss, the judge before whom the action was tried found, upon conflicting evidence, that by the mutual mistake of both parties and their agents, such permission was not inserted in the policy, and that the mistake was not discovered until after the loss. *Held*, that this finding of the judge upon the question of fact being conclusive, a judgment directing the policy to be reformed, and that the plaintiffs recover the amount insured, was properly rendered.

A policy of insurance can be reformed after a loss has occurred.

THIS action was brought to reform a policy of insurance and recover thereon for a loss sustained. It was tried by consent before Justice BARNARD, at Special Term, a jury having been waived.

It was admitted on the trial, that the plaintiffs were partners, as alleged in the complaint, and the owners of the property insured; that said policy was issued to them by defendants, and that a loss occurred as stated in the complaint, and to the amount therein set forth,

Van Tuyl v. Westchester Fire Insurance Company.

and proper proof thereof had been duly furnished to defendants, and that if liable at all, they were liable for the amount claimed in the complaint; and that the only questions to be tried were, whether the defendants agreed to insert in said policy permission to run over or extra time, and at nights occasionally, as business might require, and whether the policy could be reformed in this action.

The facts in relation to the transaction are as follows: The plaintiffs were partners, and owners of the property described in the policy in suit, and A. P. Van Tuyl was their managing agent. The defendants were a Westchester company, doing business in New York city through J. F. Hanford, agent. In December, 1869, Thomas Dockum, an insurance agent, procured a policy of insurance for them on their building, 273 Cherry street, New York, from defendants. Van Tuyl, the plaintiffs' agent, discovered in that policy, in minute print, a condition that if the premises stood on leased ground, or if it was a manufacturing establishment running in whole or in part over or extra time, or at night, it must be so stated in the policy, and express permission given. He informed Dockum of that clause, and directed him to have the permission inserted. Dockum took the policy back to have such permission inserted, and stated the facts to J. F. Hanford, the agent of the defendants, and who issued the policy. He refused to give such permission, or to write on leased ground, and the policy was cancelled. Thereafter Dockum was directed by Van Tuyl to procure \$5,000 on the stock and merchandise. Dockum, on the 26th day of January, 1870, procured \$2,500 of it from the United States Fire and Marine Insurance Company of Baltimore, and applied to J. F. Hanford, the agent of defendants, for the rest. Hanford agreed to write, as the other companies did, and to give permission to run over or extra time,

Van Tuyl v. Westchester Fire Insurance Company.

and at night occasionally, and told Dockum to bring in his form. It was claimed that Dockum took in to him the policy of the United States Company, of Baltimore, which had that day been issued, and which contained no restriction against running nights, and told him to copy that, and insert the permission to run over or extra time, and at nights occasionally, as business might require. Dockum received the policy a day or two after, paid the premium, and delivered it to Van Tuyl. Neither Van Tuyl nor Dockum discovered the omission until after the loss, which occurred May 18, 1870. The amount was \$1,343.75, and due proofs were furnished and accepted. The policy contained a provision against manufacturing establishments running at night, and it was admitted that on the night of the fire plaintiff's mill ran till 10 o'clock, and that the fire occurred after that hour.

J. F. Hanford, the agent of defendants, was examined. He did not deny that the first policy was issued and cancelled for the reasons and as stated by Dockum, but denied that he agreed to give such permission to run nights in the second policy. He certified that he had power to grant such permission. Penfield, the president, says the same. Jerome, Heins and Penfield were called to prove that running at nights increased the risk, and that companies charged extra rates for permission to do so; but they are contradicted by the policies of the Hamilton and Fireman's Fund Insurance Companies, who insured this risk and gave such permission, and charged the same rates as the defendants. It was also proved that all the companies who insured this risk charged the same rate as defendants, and gave permission to run nights.

Judgment was rendered for the plaintiffs, and the defendants appealed.

Other facts are stated in the opinion.

Van Tuyl v. Westchester Fire Insurance Company.

W. H. Pemberton, for the appellants.

F. E. Dana, for the respondents.

By the Court, INGRAHAM, P. J. This action is brought to reform a policy of insurance, and to recover the amount of the insurance.

The property insured was a mill. The defence is, that the property was insured upon the understanding that the same should be run and operated in the day, only, whereas, the same was operated at night, the risk thereby increased, and the fire caused during the night.

The evidence on the part of the plaintiff showed that when the application for insurance was made, the agent, Hanford, refused to insure with a clause allowing the mill to be run at night; that afterwards the plaintiff's agent applied to another company, which agreed to take half, and he then saw Hanford again, and asked him to take the other half. Hanford replied that the president had changed his mind, and would write as other companies did. That he then told Hanford they wanted the privilege to run overtime, or at night; and that he said, "bring me the form of the other company, and they would write." That he took the policy of the United States Company to him and received a policy. That he did not discover, till after the fire, that the permission to run at night was not in the policy.

Hanford testified that the party applying for insurance did not request that the policy should contain such permission, and that he never agreed thereto.

The case was tried before Justice BARNARD, of the Second Department, who found that by the mutual mistake of both parties and their agents the permission was not inserted in the policy, and that the mistake was not discovered until after the loss. He rendered judgment directing that the policy should be reformed by inserting

Van Tuyl v. Westchester Fire Insurance Company.

the permission, and then rendered judgment for the plaintiffs for the amount of the loss.

The defendants appealed, and the case was sent to this department.

It is well settled that to warrant the court to reform a contract by inserting provisions that were omitted, or in correcting the same in any matter in which an error was made, it must appear that such mistake was made by both parties. If one party was mistaken, and the other was not, no such judgment can be rendered. This, like any other question of fact, is to be settled by the jury, or by the court, if the action is tried without a jury; and where the evidence is conflicting and contradictory, the finding at the trial is conclusive upon the parties. Here there was such conflict, and the justice who tried the case has found that both parties were mistaken. There is no difference between the evidence on each side, to justify us in saying that the judgment is against the weight of evidence. Upon no other ground could we hold the finding to be erroneous.

It is urged that the policy cannot be reformed after the loss has occurred. This was held in *Solms v. The Rutgers Fire Ins. Co.*, in the Superior Court, (8 *Bosw.*, 578,) but that case was reversed by the Court of Appeals, where it was held that the plaintiff could recover. (*S. C.*, 3 *Keyes*, 416. *Bidwell v. Astor Mutual Ins. Co.*, 16 *N. Y.*, 263, and opinion of Gilbert, J., in this case on former argument.)

The blank policy, which was admitted by the learned justice, was not properly in evidence. The paper produced was not the original shown to the agent, and unless that is shown to have been lost or destroyed, a copy was not admissible. But such error could have done no harm on the trial, as the evidence was sufficient without it, and in an equity case, where it appears to have not been a material error, the court will not, on that account, grant a new trial.

 Grissler v. Stuyvesant.

The finding of the court upon the question of fact being conclusive, I see no ground on which this judgment can be reversed.

Judgment affirmed, with costs. (a)

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1878.
Ingraham and Fancher, Justices.]

(a) Affirmed by Court of Appeals. 55 N. Y., 657.

GRISLER & FAUSEL vs. STUYVESANT.

The only ground of action stated in a complaint was that the defendant had brought actions of ejectment against the plaintiffs for the recovery of certain real estate, and had afterwards, by summons, commenced summary proceedings to recover possession of the same premises, for non-payment of rent; and that the act of the defendant in procuring such summons to be issued, and all the proceedings thereon, were injurious to the plaintiffs, and, during the pendency of the ejectment suits, were an abuse of the proceedings prescribed by the statute under which the said summons was issued. The prayer was that the proceedings under the summons might be abated, and for an injunction. *Held*, on demurrer, that the complaint did not state a good cause of action.

It is no ground for an injunction that a proceeding is injurious to the plaintiff, if such proceeding is proper.

APPEAL, by the plaintiffs, from an order made at a Special Term, sustaining a demurrer to the complaint, and dismissing the complaint.

The complaint alleges that on the 13th day of April, 1870, the plaintiffs were and have ever since been, and are now in possession, and entitled to the possession of certain lands and premises in the city of New York, known as Nos. 152, 154, 158 and 160 Third avenue, claiming under a deed, a copy of which was annexed. That the said defendant has ever since the said 13th day of April, 1870, denied, and now denies, that the plain-

Grissler v. Stayvesant.

tiffs are his tenants, or that they have any title to said land or the possession thereof.

That on or about the 25th day of September, 1871, the defendant brought three separate actions against the plaintiffs in the Superior Court in the city of New York, which are at issue and still pending and undetermined, and copies of the complaints in said actions were annexed.

That on the 14th day of February, 1872, the defendant applied to Thaddeus H. Lane, Esquire, a justice of the district court of the city of New York, in the district in which said premises are situated, and procured to be issued a summons, a copy of which was annexed, and has caused the same to be served on these plaintiffs, and is proceeding to procure an adjudication by the said justice upon the allegations recited in said summons, and to procure a warrant to be issued by said justice for the removal of the plaintiffs from said premises, according to the form of the statute in such case made and provided.

The plaintiffs allege that the proceedings of the defendant in procuring such summons to be issued, and all proceedings upon such summons, are injurious to the plaintiffs, and during the pendency of the aforesaid actions in the Superior Court are an abuse of the proceedings prescribed by the statute under which said summons was issued.

And the plaintiffs pray judgment that the proceedings under said summons may be abated, and that the defendant, his agents and attorneys may be enjoined and restrained from taking proceedings on said summons, or any proceedings to remove the plaintiffs or their under-tenants from said premises, or any part thereof, during the pendency of said actions in the Superior Court, or either of them, and that an injunction to the same effect may be granted during the pendency of this action, and that the plaintiffs may have such further or

other relief as may be fit, and that the defendant pay the costs of this action.

The defendant demurred to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The court, at Special Term, made an order sustaining the demurrer, and directing the complaint to be dismissed with costs to the defendant.

John J. Townsend, for the appellants. The question raised by the demurrer is one of very great simplicity and importance. In the Superior Court, the defendant, in three actions, is seeking to eject the plaintiffs as trespassers, and claiming damages in lieu of rents and profits. At the same time he seeks to recover possession by proceeding before a magistrate, on the ground that they are his tenants by agreement. This affirmance of contrary propositions can be permitted under no circumstances. The toleration of it is inconsistent with the plainest principles of justice. (*Sanger v. Wood*, 3 *Johns. Ch. R.*, 421-422.)

The plaintiffs are entitled to a reversal of the order dismissing the complaint, and of the judgment dismissing the complaint.

Dismissal of the complaint is equivalent to a nonsuit, which can only be incurred on a judgment as in case of nonsuit rendered for a failure of proof or some matter extrinsic of the pleadings, and altogether irrespective of the merits of a complaint.

Upon the trial of an issue of law the plaintiffs are entitled to have the complaint stand, and to have the benefit of all the allegations which it contains.

Douglas Campbell, for the respondent. The demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action was properly sustained. The allegation that another action

Grisaler v. Stuyvesant.

was pending, was not an issue that could be raised or made a defence to summary proceedings. (*Duigan v. Hogan*, 1 *Bosw.*, 647.) The only case where an injunction can issue to restrain summary proceedings is where they are used as a means of fraud. (*Ward v. Kelsey*, 14 *Abb.*, 106. *Marks v. Wilson*, 11 *Abb.*, 87. *Springsten v. Powers*, 3 *Rob.*, 483. *Marry v. James*, 37 *How.*, 57.)

By the Court, INGRAHAM, P. J. The only cause of action stated in the complaint is that the defendant had brought an action of ejectment in the Superior Court, against the plaintiffs, for the recovery of certain real estate, and had afterwards commenced summary proceedings to recover possession of the same premises, for non-payment of rent. That the proceedings of the defendant, in procuring such summons, are injurious to them and an abuse of the proceedings under the statute. To this the defendant demurs.

It is difficult to see any good cause of action above stated. It is no ground for an injunction that the proceeding is injurious to a party, if such proceeding is proper. If it is not legal for the party to take such remedy, it should be defended by showing such illegality in the proceeding sought to be enjoined. Success in either of those proceedings can be pleaded to defeat the other.

The demurrer was properly sustained, and the judgment should be affirmed only so far as to render judgment on the demurrer, with costs. So much as dismisses the complaint is vacated.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1878. *Ingraham, Fancher and Davis*, Justices.]

GRISSLER & FAUSEL vs. STUYVESANT.

The statute gives an allowance on the amount recovered or claimed, or the subject-matter involved. In the latter case such value is to be ascertained by the court.

The only relief sought in an action was an injunction to restrain summary proceedings for the dispossession of the plaintiffs from certain premises, and that only for a limited period. No money was sought to be recovered, and no property was the subject-matter of the action. *Held*, that there was nothing in the case on which an allowance could be estimated; the subject-matter involved being the right to prosecute the summary proceedings, the value of which right it was not practicable to estimate.

A PPEAL, by the plaintiffs, from an order made at a Special Term, granting to the defendant an extra allowance of \$750.

The action was commenced by the plaintiffs to abate dispossession proceedings commenced against them by the defendant, and to obtain an injunction to restrain such proceedings in future. The only cause alleged by the plaintiffs for demanding such relief was the pendency of actions brought against them by the defendant for the recovery of the same property. The defendant demurred to the complaint. The court, at Special Term, made an order sustaining the demurrer and dismissing the complaint, which was affirmed at General Term. (*S. C.*, *ante*, p. 77.)

John J. Townsend, for the appellants. The only matter involved in this action is the abstract right of the defendant to pursue inconsistent remedies. The Code, § 309, gives the court no power to make an allowance in such a case. The power of a court to make an allowance in any case is exceptional, and ought to be abolished, or restrained within very narrow and clearly defined limits. Where the rights in controversy have no money value an allowance cannot be made. (*The People v. The Albany and Susquehanna R. R. Co.*, 5 *Lansing*, 25, 36.) If the plaintiffs are entitled to a re-

Grisler v. Stuyvesant.

versal of the order dismissing the complaint, they are entitled to a reversal of the order for an allowance which was predicated upon it.

Douglas Campbell, for the respondent. The extra allowance was properly granted. The dispossession proceedings were commenced to recover property worth \$100,000, or a balance of about \$15,000 of rent. This action was brought to obtain an abatement of such proceedings, and a permanent injunction to restrain similar proceedings in future. The defendants claimed, in arguing the motion before Judge FANCHER, that a proper basis of allowance was the value of the real estate itself, but he held that the rent due was the correct basis. The plaintiffs can hardly complain of this. On the most favorable construction for them, this was the amount of the subject-matter involved. The words of the Code are in the disjunctive: "Upon the amount of the recovery or claim, *or* subject-matter involved." The value of the property to be directly affected by the result of an action affords a proper basis for computing the percentage authorized by section 309 of the Code in difficult and extraordinary cases. So held where the action was brought to restrain the defendants from discontinuing and removing a railroad. (*People v. A. & V. R. R. Co.*, 16 *Abb.*, 465.)

In a strict sense, the amount of the plaintiffs' claim was nothing, but they were attempting to prevent the defendant from recovering his property or his rent, and that was the amount involved.

By the Court, INGRAHAM, P. J. The only relief sought in this action was for an injunction, and that only for a limited period. No money was sought to be recovered, and no property was the subject-matter of the action.

The statute gives an allowance on the amount recov-

Elwell v. Grand Street and Newtown Railroad Company.

ered or claimed, or the subject-matter involved. In the latter case such value is to be ascertained by the court.

There was nothing in this case on which an allowance could be estimated, nothing received, and no money or property claimed in the action. The subject-matter involved was the right to prosecute the pending proceedings before the justice. It is not practicable to estimate the value of that right. The determination whether the plaintiff shall be permitted to prosecute the summary proceedings did not involve the recovery of the lands nor of the rent alleged to be due.

The decision on the demurrer did not affect the right to the rents, nor the right to the lands.

The remedy of the defendant for expenses and damages in restraining his proceedings should be had on the injunction undertaking.

The order should be reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, November, 1873.
Ingraham and Davis, Justices.]

JOHN P. ELWELL and others vs. THE GRAND STREET
AND NEWTOWN RAILROAD COMPANY.

A mortgage upon a railroad not completed at the time the mortgage was executed, in terms conveyed the franchise of the company, and all property to be acquired, describing the road as it was then projected. Before the road was completed, a change was duly made in the route. *Held*, that the mortgage as executed bound the road as built; that the bondholders, to secure whose debts the mortgage was given, acquired a right to have the road, as *built*, sold to pay their bonds; and that purchasers at the foreclosure sale bought, and held, all that the bondholders had a right to have sold.

Although the resolution authorizing the giving of a mortgage, by a railroad company, does not give the president and secretary authority to make so extensive a mortgage as the one in fact executed; yet after the bondholders have advanced their money in good faith, and it has been received and used by the company in constructing its road, this will be deemed a ratification of the contract under which the money was obtained.

Elwell v. Grand Street and Newtown Railroad Company.

ACTION to recover the possession of property purchased by the plaintiffs at a foreclosure sale.

PRATT, J. The plaintiffs claim under a purchase made at a sale on foreclosure of a first mortgage upon a railroad not completed at the time the mortgage was issued. The bondholders under that mortgage advanced their money in good faith and it was received by the company and used in constructing its railroad. The road was described in the mortgage as it was then projected, but before it was completed a change was duly made in the route. The question is whether the mortgage as executed binds the road as built.

The mortgage in terms conveys the franchise of the company, and all property to be acquired. Such mortgages are allowed by the general railroad act, and have been held to convey branch roads not contemplated at the time of the original location, as incident to the principal grant. (25 *Barb.*, 284-308.) The road mortgaged is regarded as an entirety.

To hold that by deviating from the route laid down, the road could be *pro tanto* freed from the lien, would be to announce a very dangerous doctrine. The object of the railroad act is to encourage the construction of necessary public works, and the policy of the law would be departed from by any ruling that should tend to weaken such securities.

It is suggested that the resolution authorizing the mortgage did not give the president and secretary authority to make so extensive a mortgage. But it has been repeatedly held that the receipt and retaining of the moneys is a ratification of the contract under which the money is obtained. (20 *Verm.*, 425. 25 *Ills.*, 336. 12 *N. H.*, 236.) If that is law, the precise extent of the previous authority would seem to be of small importance.

Good faith forbids that a security should be invali-

Elwell v. Grand Street and Newtown Railroad Company.

dated after one party has received the full benefit, and can no longer place the other party in as good position as it originally occupied.

I hold, therefore, that the bondholders under this first mortgage acquired a full right to have the road, as *built*, sold to pay their bonds, and the plaintiff (the purchaser) purchased, and now holds all that the bondholders had a right to have sold.

The purchasers under the second mortgage to Randall, took their title with full knowledge of the claim of the plaintiff and his grantors. The rights of the plaintiff had become fixed and absolute before the bringing of this suit, and it is now too late for the defendants to set up a mistake in the first mortgage, and to release and ask to have them reformed.

Neither instrument is ambiguous ; and whatever may have been the intent of the parties, as a matter of fact, the law will now give effect to the instruments according as they are written.

The defendants derive their title through the company, subsequent to the giving of the first mortgage and receipt of the money under it — and if the mortgagors are estopped from denying the validity of that first mortgage, the defendants are also estopped from denying it ; so that the only question, after all, is, whether the first mortgage, in its terms, covers the piece of railroad in dispute.

As a matter of law, I hold that the terms in that mortgage do cover the road described ; from which it follows that the plaintiffs must have judgment as prayed for in their complaint.(a)

Judgment for plaintiffs.

[KINGS SPECIAL TERM, January 5, 1874. *Pratt*, Justice.]

(a) The above decision was affirmed, at a General Term.

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BARTHOLOMEW and others vs. LYON.

The objection that plaintiffs, being infants, have no legal capacity to sue in ejectment, should be presented by demurrer, where the fact of infancy appears on the face of the complaint.

But where the widow of the infants' father unites with them in the suit, it may be assumed that she is the mother of the infants, in the absence of any evidence that the father had a former wife; and hence, as by the death of her husband, who died seised, the mother became vested with the rights, powers and duties of a guardian in socage, she can, as such, maintain the action.

And, the proper party being on the record as plaintiff, and the cause having been tried on the merits, an amendment of the pleadings will be allowed, on appeal, if necessary, to answer the technical objection then first raised, that infants cannot maintain such an action.

An objection, urged as a ground of nonsuit, may be obviated by subsequent proof.

In an action of ejectment, admissions or statements, made by parties in possession, were received, with a view to explain or characterize their possession. *Held*, no error.

THIS case came before the court on a case and exceptions, ordered to be first heard at General Term.

The action was brought by the widow and heirs of Daniel Bartholomew, deceased intestate, for the recovery of real property, to wit, thirty acres in the south west corner of lot No. 5, of great lot No. 143 in the old town of Chemung, Chemung county.

The complaint alleged that Daniel Bartholomew died intestate, December, 1867, seised of the premises claimed; leaving the plaintiffs, who are his widow and heirs at law, him surviving; that in 1871 the defendant wrongfully entered into possession of the premises, claimed right thereto, ousted the plaintiffs therefrom, and still unjustly withholds the same.

The defendant, by his answer, admitted that the plaintiff, Ellison Bartholomew, was the widow of Daniel Bartholomew, deceased, and that the other plaintiffs were his heirs at law; set up that he had been in the open, continued and notorious possession of the premises,

Bartholomew v. Lyon.

claiming title thereto, for more than thirty years, and that he had title thereto in fee.

On the trial, evidence tending to establish the plaintiffs' title was given; and they had a verdict in their favor, for the possession claimed, except for about five acres, described as situated between the creek on one side and the highway on the other, on which was the defendant's house, the possession of which he defended and justified under an adverse possession.

The facts of the case, so far as they are necessary to the present examination of it, are given in the following opinion. (See *S.C.*, very briefly reported, 3 *Thomp. & C.*, 774.)

Smith & Hill, for the plaintiffs.

R. King, for the defendant.

By the Court, BOCKES, J. The plaintiffs, except the widow of Daniel Bartholomew, deceased, are all infants, and appear by their mother, the widow, as their guardian *ad litem*, to prosecute the action. It is now objected that the complaint shows no cause of action as to the infant plaintiffs, that they, being infants, have no right to the possession of the land. The objection amounts to this, that being infants, they have no legal capacity to sue in ejectment. This objection was not taken by answer nor was it raised on the trial. According to the decision in *Seaton v. Davis* (1 *Thomp. & C.*, 91,) it should have been presented by demurrer. MULLIN, P. J., there says: "It appears on the face of the complaint that the plaintiff, a minor, brings an action of ejectment to recover the possession of land;" and he adds, "the case was therefore one in which it was necessary for the defendant to demur, or the objection would be waived." (*Code*, § 144.)

But it may be assumed that the widow is the mother

Bartholomew v. Lyon.

of the infant plaintiffs, as she was the wife of their father, there being no evidence that he had a former wife; hence, as was said in *Sylvester v. Ralston*, (31 Barb., 286,) by the death of her husband, who died seised of the farm in question, the mother became vested with the rights, powers and duties of a guardian in socage, (1 R. S., 718, sec. 5,) and as such she could maintain the action. (17 Wend., 75. 30 Barb., 633. 55 Barb., 428-9. 1 N. Y. Sup. Ct. R., 91, on page 93.) The proper party being on the record as plaintiff, and the cause having been tried on the merits, an amendment of the pleadings would be now allowed, if necessary to answer the technical objection here for the first time raised.

To establish their title, the plaintiffs showed a conveyance of the premises from John Chamberlin to Henry Evans, dated May 20th, 1844, acknowledged June 16th of the same year, and recorded in the clerk's office August 30th, 1847; also a contract for the sale thereof from Evans to Seth Lyon, dated October 1st, 1844; also evidence tending to prove an assignment of this contract by Lyon to John H. Demorest, and a deed also to Demorest from Evans; also a conveyance from Demorest to Daniel Bartholomew, who died intestate, December, 1867, leaving the plaintiff, Ellison Bartholomew, his widow, and the other plaintiffs, his heirs at law.

The deed from Evans to Demorest was not produced; nor had it been recorded; but evidence of its existence was given, quite sufficient to establish that fact. So, too, there was proof of possession and of acts of ownership of the premises by the grantees in the several deeds. At least there was evidence on all these questions of fact sufficient to sustain the verdict of the jury in favor of the plaintiffs.

When the plaintiffs rested their case, it was urged as ground of nonsuit, that there was no evidence of ouster by the defendant; that it did not appear that he was in

Bartholomew v. Lyon.

possession of the premises claimed. This was the only ground of nonsuit there urged. The court very properly refused to nonsuit. There was evidence of a claim of ownership and possession on the part of the defendant. But were this otherwise, the objection was obviated by subsequent proof. (21 *Barb.*, 241. 11 *N. Y.*, 102, 112. 2 *Hill*, 620.) Besides, the defendant in his answer averred possession and ownership in himself. The refusal to nonsuit presents no ground of error calling for a new trial.

The defendant sought to defeat the plaintiffs' recovery by showing title in a third party. To this end he put in evidence, a deed from Gertrude Cutting to Asahel Buck, embracing the premises in controversy, with others, dated October 7th, 1835; also a mortgage from Buck to one John Chamberlin covering the same premises, dated Nov. 13th, 1835; also a foreclosure of the mortgage in chancery in 1843, and a deed of sale under the decree in such foreclosure, by the sheriff of Chemung county, to John G. McDowell, dated March 10th, 1855. This deed was made under an order of the court, to perfect a sale alleged to have been made under the decree, by Sylvester Hayne, as master in chancery, on the 20th October, 1843, since deceased. The court held that this evidence failed to show title out of plaintiffs. In this we are of the opinion the learned judge decided correctly. There was no evidence whatever that Gertrude Cutting had title when she made the deed to Buck, in 1835. So it does not appear, by any legal evidence, that Buck had title when he made the mortgage to Chamberlin. There is no evidence that either Cutting or Buck were ever in possession; nor that McDowell ever had or claimed possession of the premises in dispute under the sheriff's deed to him. For aught that appears, those conveyances and proceedings were all by and between persons without right or title to the land in controversy. The learned judge was right in holding that

Bartholomew v. Lyon.

those foreclosure proceedings presented no defence to the action.

The defendant showed no title in himself; and if no error was committed on the trial in the admission or rejection of evidence, the verdict, being sustainable on the plaintiffs' proof, should be upheld and carried into effect by judgment.

A memoranda was produced with a view to refresh the recollection of the witness. The court admitted its use for this purpose. In this there was no error. (22 *N. Y.*, 462. 15 *N. Y.*, 485. 29 *N. Y.*, 346.) Admissions or statements by parties in possession were allowed with a view to explain or characterize their possession; and in this there was no error. The objections to the admission and exclusion of evidence on the part of the defendant are numerous, but after a careful examination, it does not appear that any error was committed in those regards which can affect the merits of the case. So also there are numerous exceptions to the charge of the judge, and to his refusal to charge as requested; but none, as we believe, present any substantial ground of error. The case seems to have been properly disposed of on the merits, and we are of the opinion that the plaintiffs should have judgment on the verdict.

The judgment must be made to conform to the verdict by the exception of the part described as lying west of the north and south fence, between the creek and the highway.

The motion for a new trial is denied, and judgment is ordered for the plaintiffs on the verdict, with costs.

[THIRD DEPARTMENT, GENERAL TERM at Albany, March 12, 1874.
Miller, Boeckes and Boardman, Justices.]

SWEET and wife *vs.* BEAN and wife.

Where the grantors in a deed, although not positively *non compos*, are yet, from age and infirmity, under an influence and in a condition of mind to be little able to guard against imposition, or to resist importunity or undue influence, it becomes the duty of the court to criticize the transaction with severity, in order to see whether fraud, actual or constructive, has been designed and perpetrated.

The plaintiffs — a man eighty years of age, enfeebled by age and infirmity, both in mind and body, and his wife, who was in a similar condition from recent illness — conveyed a farm worth \$6,500, and surrendered personal property of the value of \$1,500, to the defendant, who had lived with them for many years and had their confidence, upon the understanding that the latter should pay the debts of the grantors, amounting to \$1,500, and support the grantors during their lives. The deed contained a reservation of the use of the farm, for life, to the grantors or the survivor; but there was no covenant by the grantee to pay the debts or support the plaintiffs. The deed was prepared under and by the discretion of the defendant; the grantors taking no counsel in regard to the propriety of the arrangement. The referee found that the defendant fraudulently took advantage of the condition of the husband's mind to induce him to make the conveyance, and surrender the personal property, and did in fact obtain the deed from him by fraud and undue influence. *Held*, that these findings, being supported by the evidence, warranted a judgment setting the deed aside for fraud and undue influence.

APPEAL by the defendants from a judgment entered on the report of a referee.

The action was brought to set aside a deed made by the plaintiffs to the defendant, Bean, on the ground of fraud, undue influence and incapacity of the grantors, and for an accounting.

The case was heard before a referee, who directed judgment in favor of the plaintiffs, with costs. Judgment having been entered, the defendants appealed to the General Term of this court. (*S. C.*, very briefly reported, 3 *Thomp. & C.*, 772.)

E. H. Benn, for the appellant.

Smith & Hill, for the respondent.

By the Court, BOCKES, J. Numerous exceptions were interposed to the findings of the referee ; but none of them need be particularly noticed, inasmuch as the case on appeal depends solely on his findings of fact ; which are alleged to be against, or unsupported by, evidence.

Without giving the findings in detail, it is sufficient here to state that the referee certifies that the defendant "fraudulently took advantage of the condition of the plaintiff's mind to induce him to make the conveyance * * and to give him control of his (plaintiff's) personal property ; and did in fact obtain from him the deed * * * by fraud and undue influence." The question in the case rests on this finding. If it be supported by the evidence the judgment is undoubtedly right and should be affirmed. How then stands the case on the proof ?

It appears from the evidence that the plaintiff, at the time of the transactions brought under examination, was eighty years of age, and childless ; that his wife was of middle age, but was then considerably prostrated by recent illness, and to some extent, at least, enfeebled in mind. The defendant was a young man, about twenty-five years of age, and had lived in plaintiff's family, with some trifling exception, from early childhood, and had plaintiffs' confidence.

While this relation existed between the parties, the plaintiffs were induced to convey to the defendant the farm in controversy, of the value of six thousand five hundred dollars, and to surrender to him personal property of the value of fifteen hundred dollars, on the understanding that the defendant should pay the plaintiffs' debts, amounting to fifteen hundred dollars, and support the plaintiffs during their lives. The consideration expressed in the deed was one thousand dollars ; and the conveyance contained a reservation as follows : "also excepting and reserving to said parties of the

Sweet v. Bean.

first part, and their survivor, the use and enjoyment of said premises hereby conveyed for and during their lives and the lifetime of their survivor." The defendant immediately entered into possession of the property, both real and personal, and assumed the control and ownership thereof. He also negotiated a loan on the premises of fifteen hundred dollars, received the same and paid therefrom the plaintiffs' indebtedness, in part. But he gave back no covenant or written agreement to support the plaintiffs, or to pay and satisfy the indebtedness existing at the time against Sweet. The plaintiffs took no counsel in regard to the propriety of the arrangement, and the deed was prepared under and by the defendant's direction. There is, too, much evidence tending to show that the old man was enfeebled by age and infirmity, both in mind and body; and that his wife was in similar condition from recent illness.

Now, under the state of facts above detailed, can it be said there was no evidence of fraud, imposition or undue influence? We are met at the threshold with a strange omission and a variation from the agreement as claimed by the defendant himself. Instead of a covenant or agreement on his part to support the plaintiffs and to pay the old man's indebtedness, there was a reservation only in the deed of an estate for the life of the plaintiffs and for the life of the survivor of them. If it be said that the agreement for support and for the payment of debts was orally agreed upon, it may be significantly inquired, why was it not correctly and fully declared in writing? If care and personal attention to the wants of the plaintiffs, and relief to them from the annoyance and perplexities of business were of paramount consideration, why was not the purpose of the parties evidenced by writing in clear and definite terms? The omission to put the pretended agreement in writing, and the want of adequate and reasonable consideration as expressed in the deed, with the confi-

dential relation which existed between the parties, cast suspicion upon the transaction, and call for satisfactory explanation from the party who claims for himself profit and advantages growing out of it. It can well be understood, and the evidence warrants the conclusion, that the plaintiffs, although not positively, *non compos*, yet were under an influence and in a condition of mind to be little able to guard against imposition, or to resist importunity or undue influence. In such case it becomes the duty of the court to criticise the transaction with severity in order to see whether fraud, actual or constructive, has been designed and perpetrated.

Here the defendant was undoubtedly in a position favorable to the carrying out of a fraudulent purpose if so inclined. He had the plaintiffs' confidence. He had the opportunity for advising, raising hopes, and magnifying fears. So it has been said, that a contract obtained from one party so much in the power of the other cannot be sanctioned, if confidence has been abused, if there is inadequacy of price, or if the inference be plain that advantage has been taken of age and imbecility. It is a well settled rule of equity that he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. The burden is on the party claiming the advantage, to vindicate his acts. He must show his contract to have been fully understood and comprehended in all its essential bearings, especially when on its face it is marked with peculiarities or points of unreasonableness. In this aspect of the case the defence, I think, fails.

But I am of the opinion that there is direct evidence of imposition and fraud in this case to sustain the judgment. The deed is not in consonance with the alleged agreement, as claimed by the defendant. According to the conveyance the defendant was to have the property in remainder; whereas, both parties assumed that the

Sweet v. Bean.

defendant was to have immediate possession and absolute control. The plaintiff was under mistake, or was deceived in regard to his rights. The obligations of the defendant, as he states them, were not put in writing. *Cui bono?* Was the misstatement of the alleged contract, in so far as any rights favorable to the plaintiffs were declared in the deed, and the omission of all evidence touching the important duties and obligations of the defendant, honest and fair? Did the defendant state to the old man, as the latter testifies, that the provision for plaintiffs' support was in the deed? The old man had a right to suppose it existed somewhere. True, the defendant denies that he so stated. But under the circumstances of the case, the referee may well have believed the evidence of the former. Not only am I of the opinion that the conclusion of the referee has evidence to support it; but, I think, that any other than that at which he arrived would have been decidedly against the weight of evidence.

The findings of fact are well based on abundant proof, and the conclusions of law, pronounced in the judgment, logically flow from them.

The judgment should be affirmed, with costs.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM at Albany, March 12, 1874.
Miller, Boeckes and Boardman, Justices.]

**ANN MORAN, adm'r &c. of James Moran, deceased, vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAIL-
ROAD COMPANY.**

In an action to recover damages for the killing of the plaintiff's intestate, an employe of the defendant, by a collision caused by the negligence of the latter, evidence was given tending to establish negligence in three particulars: that the train was running at a dangerous rate of speed; that the brakes were imperfect, or out of order; and that the train was insufficiently manned. At the close of the trial, the plaintiff's counsel withdrew the first ground of negligence from the consideration of the jury. The evidence to establish the second and third grounds being very slight; *held* that it was for the jury to say whether the brakes were defective, or the train insufficiently manned, and also whether those causes, if they existed, produced the injury complained of; and that it could not be claimed that a verdict for the defendant was clearly against the weight of evidence.

Held, also, that the proof showing, plainly, that the great speed of the train was the principal, if not the only, cause of the collision, and that question having been withdrawn from the case, as a ground of recovery, the jury were authorized to find against a right of action, and an order denying a new trial, was properly granted.

Where the trial proceeded on the hypothesis that the deceased was an employe of the defendant, engaged in the business of his employment, at the time of the collision; *held*, that evidence to prove what the defendant's practice was, as to hanging out signal lights at a certain point, was properly excluded; inasmuch as the omission to give the signal, (conceding that to have been negligence,) was the negligence of a co-employe engaged in the same general employment. And that there being no evidence that the defendant's employes, or any of them, were not skilful and competent, the case was brought directly within the decision in *Warner v. Erie Railway Co.*, (39 N. Y., 468.) And that the negligence of the engineer, in running the train too fast, being the negligence of a co-employe, would, within the principle of that and kindred cases, give to the plaintiff no right of action for that.

Where the subject of great speed was expressly waived as a substantive ground of negligence, on the trial; *held*, that it could not be urged, upon appeal, as a circumstance of negligence, that the omission of the defendant to place a signal "caused the increased rate of speed."

The defendant's switchman was permitted to state that, in his opinion, the injury was caused by the running of the train with too great velocity. *Held*, that an objection to this testimony, not specifying any particular ground therefor, was too general to be of any avail.

Held, also, that such testimony was harmless; especially as it stood conceded that the subject of great speed was not to be taken into consideration, as a ground of negligence.

Moran v. New York Central &c. Railroad Company.

APPEAL by the plaintiff from an order denying a new trial on the minutes, and motion for new trial on case and exceptions, ordered to be heard in the first instance at the General Term.

The action was brought to recover damages for the killing of James Moran by the defendant's negligence.

Moran was a brakeman on the defendant's road, on a freight train running from West Albany to Syracuse. He lived in the city of Albany, and on the evening of the 27th of May, 1872, he was proceeding to West Albany to join his train, which was to leave soon after eight o'clock. He got on a passing freight train in the city of Albany to go to West Albany, as was the practice of the employes of the road; there to enter upon his duties on his train west.

The train from Albany proceeded with considerable speed to West Albany, where there was "a running switch." The engine ahead was separated from the train, and the train was switched off on a side track on which cars were standing, and, by the collision with the standing cars, the six cars in front of the train were telescoped and Moran was killed.

Evidence was given tending to establish negligence on the part of the company, in three particulars: That the train, at the time of the collision, was running at an improper and dangerous rate of speed; that the brakes were imperfect or out of order; and that the train was insufficiently manned.

At the close of the trial, the plaintiff's counsel withdrew the first above ground of negligence from the consideration of the jury; and the case was submitted on the other two points. The jury found a verdict in favor of the defendant. A motion was made for a new trial on the minutes, which was denied.

The case now comes before the court on appeal from this order; and on a case and exceptions, ordered to be

Moran v. New York Central &c. Railroad Company.

heard in the first instance at General Term. (*S. C.*, briefly reported, 3 *Thomp. & C.*, 770.)

A. J. Parker, for the plaintiff.

S. Hand, for the defendant.

By the Court, BOCKES, J. Very much of the evidence given on the trial had reference to the rate of speed at which the train was running at the time of the collision; but the plaintiff's counsel, on the trial, disclaimed all pretence of negligence based on that ground. The withdrawal of this subject as a basis of recovery, leaves the case quite barren of facts on which to found a right of action. There was, indeed, very little evidence tending to show that the brakes were out of order, or that any brake was materially defective; and still less, if indeed there was any, going to show that the train was insufficiently manned. Nor was it made at all clearly to appear that the injury complained of resulted from either of those causes. Hence the case, in its most favorable aspect for the plaintiff, was for the jury, on the facts proved. It was for the jury to say whether the brakes were defective; and whether the train was insufficiently manned, admitting that there was some slight evidence of it; and also whether those causes, if they existed, produced the injury complained of. The evidence bearing on these points was very slight. It cannot be said, with any propriety, that the verdict was clearly against the evidence.

But it is plain to see, on reading the proof, that the great speed of the train was the principal, if not the only cause of the collision. All other causes, if any existed, were insignificant compared with that. The speed was so great that the collision would have resulted had the brakes been in perfect order and the train well manned. It was a heavy train, moving with

Moran v. New York Central &c. Railroad Company.

great velocity. Six cars were crushed, or "telescoped" by the collision. The train could not have been so suddenly checked by ordinary means and appliances as to have avoided a destructive collision. Withdraw this principal cause of injury from the case, as ground of negligence, and the jury were well authorized to find against a right of action.

The order denying a new trial on the minutes should be affirmed.

The motion for a new trial on the case and exceptions remains to be examined.

The first allegation of error urged upon our consideration, is that the plaintiff was not allowed to prove what the defendant's practice was as to hanging out signal lights at the point where the train was switched off. The trial proceeded on the hypothesis that the deceased was an employe of the defendant, and at the time of the accident was engaged in the business of his employment. In this view, the evidence offered was properly excluded, inasmuch as the omission to give the signal, (conceding that to have been negligence,) was the negligence of a co-employe engaged in the same general employment. There was no evidence that the defendant's employes, or any of them, were not skilful and competent to perform the services required of them. So, in this view, the case is brought directly within the decisions in *Warner v. Erie Railway Co.* (39 N. Y., 468,) and kindred cases. But as the case was presented, the omission to place the signal was not a circumstance of negligence. The argument is that the omission "caused the increased rate of speed." It is so urged in the plaintiff's points. Yet this subject of great speed was expressly waived as a substantive ground of negligence. Besides, the negligence of the engineer in running the train too fast, would be the negligence of a co-employe, giving to the plaintiff no right of action for that, within the principle of the

Moran v. New York Central &c. Railroad Company.

case above cited. The exclusion of this evidence constitutes no ground of error.

It is next urged that the court erred in permitting the defendant's switchman to state that, in his opinion, the injury was caused by the running of the train with too great velocity. The objection interposed was general. No ground of objection was stated. If put on the ground that the witness was not competent to give an opinion, it should have been so stated. His competency might then have been shown, perhaps. But I am of the opinion that the evidence was entirely harmless. The witness stated, against the plaintiff's objection, that he thought the injury to the train was caused by its running at too great a rate of speed—that if it had come up at the moderate and usual rate it would not have done so much damage—that coming slower it could have been more easily checked. Now all this evidence was but the expression of common observation. Of course the velocity of the train caused the injury to it. Testifying to this fact could do no harm; especially when it stood conceded that the subject of great speed was not to be taken into consideration as ground of negligence.

It is also urged that the court erred in charging that there was no evidence from which the jury could find that the defendant was negligent in not furnishing a sufficient number of men (as it is understood) to run and manage the train.

After carefully examining the case, I am of the opinion that the learned judge correctly charged in this regard. There was no evidence whatever that the train was insufficiently manned. For aught that appeared, there were enough men employed on it to run it with ordinary safety. There is absolutely no evidence from which the contrary could be fairly inferred.

It seems, therefore, that the case presents no ground of error in the admission or rejection of evidence nor in

Blanchard v. The New Jersey Steamboat Co.

the charge of the court. The motion for a new trial should therefore be denied, and the defendant is entitled to judgment on the verdict, with costs.

The view here taken of this case renders it unnecessary to inquire whether the plaintiff's intestate should not be held to have been a trespasser on the train, or at least riding on a mere naked license. This question is not considered.

The order appealed from should affirmed, the motion for a new trial denied, and the defendant is entitled to judgment on the verdict with costs.

Judgment accordingly.

[THIRD DEPARTMENT, GENERAL TERM at Albany, March 12, 1874.
Miller, Boeckes and Boardman, Justices.]

BLANCHARD & FARNHAM vs. THE NEW JERSEY STEAMBOAT COMPANY. (a)

In an action for damages caused by a collision between vessels, a witness being examined as to the location and position of the vessels at the time, and as to the extent of navigable water on each side of them, and having giving the distances; *held*, that it was proper for him to state the fact whether or not there was deep water on each side for the vessels to pass safely without grounding.

A witness, having testified that vessels did not all carry the same signal lights, was asked, "What differences are there?" *Held*, that the question was immaterial, the point being what signal lights the plaintiffs' boat carried, and whether they were sufficient, as an admonition to other vessels.

A witness was asked: "Was there a custom, among pilots, at flood-tide, as to which side of the channel vessels were to go down in that neighborhood?" He answered: "They went down further to the east than I was." *Held*, that the evidence was not objectionable; as it tended to show the true position of the vessel, as to navigable water. That even if the answer tended to show a custom, it was competent; notwithstanding the mode of navigation is regulated by law.

(a) Affirmed by Court of Appeals. 59 N. Y., 292.

Blanchard v. New Jersey Steamboat Co.

A witness, on his cross-examination by the defendant's counsel, having spoken as to the value of the vessel sunk, and being questioned as to his competency to testify on that subject, stated that he had known of the sale of various steamboats, naming one — the M. — whose price was \$3,500. On his re-examination he was asked the *value* of the M., and answered "\$16,000." *Held*, that the defendant's counsel having opened the subject of the value of the M., and drawn out the fact, from the witness, that the price of that vessel, on the sale, was \$3,500, the subject was opened to the plaintiffs to ask of the witness her real value.

A wrecker, who has been in the business for twenty years, has raised sunken vessels, has superintended an examination of a particular vessel after she was sunk, and made soundings around her, may be asked whether she could be raised, and what it would cost to get her up.

Where a witness for the defendant had, on his examination, denied the making of certain statements, pertinent to the issue, his attention being called to the time, place and occasion; *held*, that it was competent for the plaintiff to prove that he did make them, for the purpose of affecting his credibility.

THIS is an appeal from a judgment directed by a referee, to whom the action was referred to hear and determine it. (*S. C.*, briefly reported, 3 *Thomp. & C.*, 771.)

By the Court, BOCKES, J. The plaintiffs were the owners of the steam tug Telegraph, which, on its downward trip on the Hudson river, with a tow attached, collided with the defendant's steamer, the Drew, proceeding in the opposite direction; by which collision the plaintiffs' vessel was wrecked and became a total loss. A great amount of evidence was given before the referee, on which he found, that the Telegraph was struck and run down by the fault and negligence of the agents and servants of the defendant, without fault or negligence on the part of the plaintiffs contributing to the injury; and he awarded judgment in favor of the latter for the value of their vessel so destroyed.

The referee's report or decision gives the facts and circumstances attending the collision, as found by him, in detail and minutely; which, if supported by the proof, are abundantly sufficient to justify the recovery.

It is a common occurrence, on the trial of actions where negligence is charged, that the evidence is conflicting—oftentimes strangely so, and to an extent and with a directness leading to the almost necessary conclusion that truth, by some of the witnesses, is little regarded or purposely colored. This case is not an exceptionable one in this respect. The plaintiffs' witnesses are distinct and uniform in their statements of the occurrences attending the collision of the vessels, and fully support the findings of the referee, on which the right of recovery is predicated.

On the other hand the defendant's witnesses dispute those statements quite unequivocally in so far as they show, or tend to show, negligence attributable to the latter. According to their evidence, the officers and crew of the *Telegraph* were in fault, rather than those in charge of the *Drew*. It then became the duty of the referee, and it was peculiarly within his province, to find and certify the facts on this conflicting proof; and the court, on appeal, must accept his findings as conclusive. As above stated, his findings of fact taken as true, abundantly sustain the recovery; and unless some error was committed by him in the reception or rejection of evidence the judgment must be affirmed.

The case will now be considered on the rulings of the referee on questions of evidence.

(1.) The first objection to which our attention is called was interposed to a question by the plaintiffs' counsel as follows: "Was there any difficulty in the *Drew* passing west of the *Telegraph*?" The witness answered, "No, sir; west of the *Telegraph* the *Drew* had 1,400 or 1,500 feet, or more, in which to pass." Question—"Could she have passed east of the *Telegraph* safely?" Answer—"No, sir." Now it must be held in mind that the witness was being examined as to the location and position of the vessels in navigable waters—that is, as to the extent of navigable water on each side

Blanchard v. New Jersey Steamboat Co.

of them. In his answer he gave distances ; and it was proper for the witness to state the fact whether or not there was deep water on each side for the vessels to pass safely without grounding.

The fact in this regard was what was sought by the examination ; and in this view there was no error in the admission of the evidence.

(2.) A witness had testified that towing vessels did not all carry the same signal lights. The question was then asked, "What differences are there?" To which the plaintiff's counsel objected as immaterial. The objection was sustained. The question was plainly immaterial. What signal lights the Telegraph carried, and whether they were sufficient as an admonition to other vessels, was the question, in so far as signal lights were concerned. The difference in signal lights on other towing vessels was wholly unimportant. No harm resulted from this ruling.

(3.) The question was put by the plaintiff's counsel as follows : "Was there a custom among pilots, at flood-tide, as to which side of the channel vessels were to go down, in that neighborhood?" The defendant's counsel objected, and the objection was overruled. The answer was, "They went down further to the eastward than I was." This was not an answer to the question, except inferentially. The answer is in effect that vessels did pass down farther east than the point at which they were passing. The evidence was not objectionable, as it tended to show the true position of the vessel as to navigable water. But even if the answer tended to show a custom, it was competent, notwithstanding, as was insisted in the objection, that the navigation was regulated by law. It was competent for the plaintiffs, who were charged with running their vessel out of place, to show that this was not so ; but that she was at the time of the injury, where vessels passing down the river usually ran. The admission of the answer to the question is no ground of error.

Blanchard v. New Jersey Steamboat Co.

(4.) The defendant's counsel on cross-examination of a witness, who spoke to the value of the *Telegraph*, questioned him as to his competency to testify on that subject. The witness stated that he had known of the sale of various steamboats; and among them mentioned the *Metamora*; and said "her price was \$3,500." Then on re-examination on that point, he was asked the value of the *Metamora*. He answered, "\$16,000." The defendant's counsel had opened the subject of the value of the *Metamora*. He had drawn out the fact from the witness that the price of that vessel on the sale to which the witness had referred, was \$3,500. The subject was now opened to the other side to ask of the witness her real value.

But in the way in which the subject came up, the entire matter of inquiry in regard to the value of the *Metamora* was simply harmless.

(5.) A wrecker, who had been in the business for twenty years—had raised vessels—had made attempts to raise others and found it impracticable—who had known the *Telegraph* for twenty-five years—had superintended an examination of the vessel after she was sunk, and made soundings around her, was asked, whether she could be raised; and what it would cost to get her up. He answered, against objection by defendant's counsel, that it would be impossible to raise her whole, as she was half cut in two; and, in substance, that it would cost all the vessel was worth to raise her. He was shown competent, beyond question, to give this evidence. It is difficult to see in what respect he was ignorant on the subject as to which he was interrogated, or how he was deficient in practical experience. The evidence was plainly admissible.

(6.) The bill of sale of one-third of the vessel by Pratt to the plaintiffs, although at first excluded, was afterwards received in evidence. Therefore the error in

Meddaugh v. Bigelow.

rejecting it, (if that was error,) was obviated by its subsequent admission.

(7.) The evidence given to contradict Best, one of defendant's witnesses, was competent for that purpose. Best, on his examination, had denied the making of certain statements pertinent to the issue, his attention being called to the time, place and occasion. It was therefore competent for the plaintiffs to prove that he did make them, for the purpose of affecting his credibility.

The case has been above considered on each and every point of alleged error. In our opinion, the findings of fact by the referee are neither without evidence to support them, nor are they manifestly against the weight of evidence. The proof was voluminous, and, on most of the material points, conflicting. But for anything appearing to the contrary, the evidence was fairly considered and proper weight given it. Nor was any evidence erroneously admitted or rejected on the trial.

The judgment must be affirmed with costs.

Judgment affirmed.(b)

[THIRD DEPARTMENT, GENERAL TERM at Albany, March 13, 1874.
Miller, Boeckes and Boardman, Justices.]

(b) Affirmed by Court of Appeals. 59 *N. Y.*, 771.

MEDDAUGH vs. BIGELOW.

A plaintiff, being now permitted to state his own case, as a witness, ought, when he is conversant with all the facts, to be able to make his right of action entirely plain.

If the plaintiff's case is not free from doubt, on his own testimony, and it wholly fails for want of preponderance of proof, when considered in connection with the evidence of two witnesses on the part of the defence, who were conversant with all the facts, and whose testimony in denial is clear, exact and circumstantial, a verdict in favor of the plaintiff is clearly against conscience ;

Meddaugh v. Bigelow.

and the judge is justified in setting it aside and ordering a new trial; and that without imposing terms.

A PPEAL from an order granting a new trial on the minutes of the court.

The action was brought to recover \$1,000 alleged in the complaint to have been lent by the plaintiff to the defendant, at his request. The answer was a simple denial of the complaint.

The action was tried before Justice MURRAY, with a jury.

But three witnesses were sworn, on the trial, the plaintiff, in his own behalf—and the defendant and the former wife of the plaintiff on the defence.

The proof showed that the defendant received from the plaintiff \$1,000; but, according to the evidence on the part of the defence, the money was a payment to the defendant on a parol agreement for the purchase of a house and lot in the city of Elmira at the agreed price of \$4,000; possession of which was immediately taken, under the agreement, and was retained and continued to the time of the trial.

The plaintiff denied that the money was a payment, and insisted that it was a loan.

The jury found a verdict in favor of the plaintiff; which on the defendant's motion, was set aside by the judge, on his minutes.

From the order setting aside the verdict and granting a new trial the plaintiff appealed to the General Term. (*S. C.*, reported very briefly, 3 *Thomp & C.*, 775.)

R. King, for the appellant.

Collins & Atwill, for the respondent.

BOOKES, J. The learned judge who tried the cause at the circuit, came to the conclusion, after careful consideration of the case on all the proof, that the verdict was

Meddagh v. Bigelow.

manifestly against the weight of evidence. He says: "The weight of evidence is so preponderating in favor of the defendant, that the conclusion is irresistible that the jury either fell into some mistake and adopted some mistaken theory, or else were governed by prejudice in finding for the plaintiff." In this conclusion we are of the opinion he was right. The plaintiff's case rested entirely on his own testimony. He was not willing to testify that the money passed as a loan, although he says, in substance, that he expected it to be returned. If, however, he parted with it under this expectation, and it was so accepted by the defendant, it would in law amount to a loan. But the testimony of the plaintiff is of doubtful import. He does not make it clear that the money was to be returned to him. He leaves the subject in doubt and uncertainty. Many of his statements, too, are plainly partial and colored. As was well said by the learned judge, in his opinion on the motion, "Taking his evidence alone, and giving it full credit, there would be great doubt what the truth of the matter was." On his own evidence a jury might well have found that a right of recovery was not established. A party may now state his own case, and when he is conversant with all the facts, he ought to be able to make his right of action entirely plain. The plaintiff's case was not free from doubt, on his own testimony.

But it wholly failed, for want of preponderance of proof, when considered with the evidence on the part of the defence. Two witnesses, who were conversant with all the facts — the defendant and the plaintiff's former wife — state distinctly and unequivocally, that the money passed as a payment. They are clear, exact and circumstantial in their evidence.

Unlike the plaintiff's case on his testimony, their case on their evidence is not in doubt. They both testify to the agreement to purchase the house and lot, state the price agreed to be paid, and say distinctly that the money

The People v. Lord.

claimed by the plaintiff was delivered to the defendant, and was accepted by him in part payment. The preponderance of evidence is very manifestly with the defendant. On the case made at the trial the verdict is clearly against conscience, and the judge was right in setting it aside and ordering a new trial ; and he would have been justified in so doing without imposing terms, in a case of such manifest injustice.

The order appealed from must be affirmed, with \$10 costs ; and the defendant must have twenty days after service of a copy of the order of affirmance, within which to comply with the condition of the order appealed from.

MILLER, P. J. I concur. Independent of any other view of the question, I think the judge who tried the cause, and heard the witnesses testify, was better qualified to determine whether the jury were misled, than any other tribunal ; and as he exercised his discretion judiciously and properly, this court should not interfere.

BOARDMAN, J., also concurred.

Order affirmed, with \$10 costs.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, March 12, 1874.
Miller, Boeckes and Boardman, Justices.]

THE PEOPLE, *ex rel.* Alexander S. Johnson, testamentary trustee, &c., *vs.* JANE A. LORD.

The defendant testified that her husband had access to a drawer in which she had last seen a certain paper, and that he had destroyed some papers which were in the drawer. He was not called on to show that he destroyed the paper, nor was its loss otherwise accounted for. *Held* insufficient evidence of loss to admit secondary evidence of the contents of the paper.

When it appears that the party offering parol evidence of the contents of a

The People v. Lord.

written instrument would have an interest in getting rid of the original, in order to introduce secondary evidence of its contents, the clearest proof of loss is required.

THIS case came before the court upon a writ of *certiorari*, issued by Justice DOOLITTLE, directed to E. B. Hastings, Esq., a justice of the peace of the city of Utica, and returnable at the General Term, to review a judgment rendered by said justice, in favor of the defendant and against the relator, in summary proceedings instituted by the relator to remove the defendant from the possession of premises occupied by her.

Mr. Alexander B. Johnson, deceased, in his lifetime gave a lease of certain premises in the city of Utica, to the defendant, for the term of five years, commencing May 1, 1867. Johnson died shortly afterwards, leaving a last will by which the relator was appointed trustee. As such trustee, he received from the defendant, at various times, the rents due under the lease.

The summary proceedings were instituted on the 1st day of May, 1872, on the ground that the term of the defendant under the lease had expired. The defendant alleged, by way of defence, that after said lease was executed, and while she was in possession of the premises, A. B. Johnson, the lessor, delivered to her a writing, whereby he extended the lease, on the same conditions, for the term of two years from the 1st of May, 1872, and that she held by virtue of said writing. The writing was not produced. The defendant testified, in the proceedings before the justice, on her direct examination, as follows: "I put this paper in a box in a table drawer, with other papers; this paper was about a quarter sheet of cap, in size; it had writing on it; it was handed to me by Johnson himself, a few days after the giving of the lease; some time since I saw this paper; a year and a half to two years ago; last time I saw it, to my recollection, was when I was clearing out

The People v. Lord.

some papers, and destroying some of them; I kept other papers and letters in this drawer; I do not know what became of this paper; I have made a search for the paper—searched thoroughly for it; last searched for it yesterday; may have searched two or three days in all; perhaps not so much; I am unable to find the paper; I am sure I had such a paper; I found my husband destroying papers taken from this drawer over a year ago; he burned up a number of papers at this time; some from this drawer; I went to look and found he had destroyed papers; I found one note in two—part destroyed and part left; this drawer was the place where I always kept this paper; I have burned papers from this drawer myself, but I never destroyed this paper myself, intentionally; nor did I ever consent to its being destroyed by any one else.”

On cross-examination, the defendant testified:

“Nothing fixes the time in my mind when the papers were burned, precisely; may be a year ago, more or less; think I saw the paper last some eighteen months ago; am quite certain I saw paper within the six months prior to the time the papers were taken out and burned; it was always kept there, and there is where I saw it last; I do not know whether my husband ever saw paper or not; I kept the original lease or duplicate in a pocket-book in a basket; I never put the continuation of lease with the duplicate I had; I kept my larger papers in the pocket-book, smaller papers in another place.”

Judgment was given by the justice in favor of the defendant.

Francis Kernan, for the relator, cited 3 *R. S.*, 5th ed., 839, §§ 47, 48, 691, § 109; 2 *id.*, 1st ed., 516; *Laws of 1868*, vol. 2, p. 1932, § 5; *Niblo v. Post*, 25 *Wend.*, 280, 311; *Buck v. Binninger*, 3 *Barb.*, 391, 400, 401; 6 *N. Y.*, 319, 321, 324–6; *Russell v. Rogers*, 15 *Wend.*, 351; *Jack-*

The People v. Lord.

son v. Frier, 16 *John.*, 193; *Jackson v. Root*, 18 *id.*, 60; *Jackson v. Hasbrouck*, 12 *id.*, 192.

S. I. Barrows, for the defendant, cited *Potter v. Deyo*, 19 *Wend.*, 361; *People ex. rel. Storer v. Stiner*, 30 *How.*, 129; *People ex. rel. Livermore v. Hamilton*, 39 *N. Y.*, 107, 108; *Avery v. Woodbeck*, 62 *Barb.*, 557; *Code*, §§ 366, 399; *Lobdell v. Lobdell*, 23 *How.*, 347-8; *Dunham v. Simmons*, 3 *Hill*, 609; *Smith v. Hill*, 22 *Barb.*, 656; *Sheldon v. Wood*, 2 *Bosw.*, 269; *Newton v. Harris*, 6 *N. Y.*, 345; 47 *Barb.*, 523; 34 *N. Y.*, 383; *Williston v. Williston*, 41 *Barb.*, 635; 1 *Greenl. on Ev.*, § 358; *Graham v. Crystal*, 1 *Abb.*, *N.S.*, 121; *Board of Supervisors of Livingston Co. v. White*, 30 *Barb.*, 72; *Bank of North America v. Embury*, 33 *id.*, 323; *Leland v. Cameron*, 31 *N. Y.*, 115; *Pitney v. Glens Falls Ins. Co.*, 61 *Barb.*, 337; *Spaulding v. Hallenbeck*, 35 *N. Y.*, 204; *Quin v. Lloyd*, 41 *id.*, 349; *Halsey v. Black*, 26 *How.*, 97; 28 *N. Y.*, 438; 49 *Barb.*, 146; 31 *N. Y.*, 480.

By the Court, MULLIN, P. J. The judgment of the justice must be reversed, for the reason that parol evidence of the contents of the writing extending the term of the tenant for two years from the expiration of the original lease, was improperly received.

The respondent's husband not only had access to the drawer in which the paper was last seen, but he took from it, and destroyed, papers that were in the same drawer, and he was not called to show that he destroyed the paper, nor but that he took it, and has it still in his possession.

To authorize the introduction of secondary evidence of a writing, it must clearly appear that it is in the possession of the opposite party, or that it is lost or destroyed. (2 *Cowen & Hill's Notes*, 1215.)

When it appears that the party offering the parol evidence would have an interest in getting rid of the origi-

nal paper, in order to introduce secondary evidence of its contents, it requires the clearest proof of loss. (2 *Cow. & H. Notes*, 1216.) If he destroys it voluntarily, for some fraudulent purpose, the clearest proof of loss or destruction will not entitle him to give the secondary evidence. (*Id.*, 1216.)

The paper in question was highly important. Upon it depended the plaintiff's right to remain in possession. By its loss the relator was deprived of the right to dispute its genuineness or its legal effect upon the rights of the parties.

Without intending to intimate that we think there was a fraudulent possession of the paper, we are not satisfied with the proof of either the loss, or destruction, of the paper.

The proceedings and judgment of the justice are reversed, with costs.

[FOURTH DEPARTMENT, GENERAL TERM at Rochester, April, 1874.
Mullin, E. D. Smith and Gilbert, Justices.]

CAMPBELL vs. PAGE, as President &c.

67b 113
80 AD*383

One letting a horse to another, to be used, for hire, is bound to inform the hirer of the vicious propensities of the animal, if any; otherwise he will be liable for any damages which may happen to the hirer in consequence of a vicious act of the horse.

Where the agent of the owner testified that at the time of the hiring he gave the hirer express notice of the horse's propensity to kick, and duly cautioned him on the subject, which the hirer, in his testimony, absolutely denied; *held* that the giving of notice was a question of fact, to be disposed of by the jury.

When the charge of the court is not given, in the case, and there is no exception to it, or to any refusal to charge, upon request, it must be assumed that the facts were left to the jury with full explanations of the law applicable thereto.

In an action to recover damages for an injury to the plaintiff's arm, caused by the kick of a horse which the plaintiff had hired of the defendant, the latter

Campbell v. Page.

having notice of its vicious propensities, the evidence was that the injury was of a serious character, and was likely permanently to interfere with the use of the arm. The plaintiff recovered a verdict for \$1,000. *Held*, that the court could not say, upon the evidence, that the damages were so excessive as to require the verdict to be set aside.

APPEAL, by the defendant, from a judgment entered upon a verdict, and from an order denying a motion for a new trial, made upon the ground that the evidence did not support the verdict, and that the damages were excessive.

B. B. & G. N. Burt, for the appellant.

A. B. & J. A. Steele, for the respondent.

By the Court, TALCOTT, J. The plaintiff was the master and owner of a canal boat, and hired of the agent of the Towing Company, of which the defendant is president, a pair of horses to tow his canal boat. The action is for damages sustained by the plaintiff, by reason of one of the horses kicking him when he, as he alleges, attempted to take hold of the reins to prevent their backing into the canal. There were no exceptions taken to the admission or rejection of evidence, or to the charge.

The jury found a verdict for the plaintiff for \$1,000 damages, which the defendant moved to set aside on the minutes, on the ground that there was no evidence to sustain the verdict, and that the damages were excessive.

There was evidence given which tended to show that the horse in question was accustomed to kick, and that its habits were known to the defendant's agent who was in charge of the towing station where the horse was hired, and let the horse in question to the plaintiff, at the time when the injury occurred.

Story states the rule to be, that the letter of the horse

in such a case must inform the hirer of the vicious propensities of the animal; otherwise he will be liable for the damages which happen to the hirer, in consequence of the vicious propensities in the horse. (*Story on Bailments*, § 391, a.)

In this case it appears that the agent of the defendant testified, that at the time of the hiring he gave the plaintiff express and full information as to the propensity of the horse to kick, and duly cautioned him on the subject. This the plaintiff, in his testimony, absolutely denied. This, therefore, was a question of fact to be disposed of by the jury.

The defendant also claims that the evidence shows contributory negligence on the part of the plaintiff, in his mode of approaching and managing the horses at the time when he received the kick. We cannot say that as a matter of law, upon the facts, the plaintiff was guilty of such contributory negligence. The charge of the court is not given in the case, and there being no exception to it, or to any refusal to charge upon request, it must be assumed that the facts were left to the jury with full explanations of the principles of law applicable thereto.

The evidence is that the injury to the plaintiff's arm was of a serious character, and is likely permanently to interfere with its use. We cannot say, on the evidence, that the damages are so excessive as to require the verdict to be set aside.

The order denying a new trial must be affirmed.

Order affirmed.(a)

[FOURTH DEPARTMENT, GENERAL TERM at Rochester, November, 1870.
Mullin, Johnson and Talcott, Justices.]

(a) An appeal to the Court of Appeals was dismissed, for the reason that an appeal to that court from an order denying a motion for a new trial, made on the grounds above stated, does not lie. (See 50 *N. Y.*, 658.)

WHYLAND vs. WEAVER.

In an action of ejectment, upon a lease in perpetuity reserving rent, with a right of re-entry in case of non-payment, brought by one claiming under the lessor, the plaintiff proved a regular transfer of title and interest from the lessor, which had come to and vested in the plaintiff, before suit brought. *Held*, that this chain of title, with possession of the property, was at least *prima facie* evidence that the possession was under that title, and became *actual* evidence of the fact of possession under that title when the last regular grantee in the line claimed the title and demanded the rent reserved, of the tenant in possession, and received from the latter a recognition of his right by a promise from him to pay the rent.

The tenant in possession cannot overcome such a title by showing title in himself from the same common source — the original lessor — if there is a want of connection between him and the common source.

Recitals in deeds to former tenants, of conveyances from the common source of title to their predecessors in interest, will not estop the plaintiff in such an action; he not being a privy in the estate flowing through the defendant's chain of title, and the defendant and his successive grantors being strangers to the plaintiff's chain of title.

After a witness had testified that he knew the premises described in the lease under which the plaintiff claimed, and knew the adjoining lots, he was asked whether the lot described in the complaint was embraced in the boundaries of the lease. He answered that it was. *Held*, that the testimony was competent; the fact inquired of being one which any witness was legally competent to answer, who was acquainted with the land, and the adjoining lands, and their description and locality as connected with other farms or monuments.

THIS was an action of ejectment tried at the Rensselaer circuit, in June, 1869, before Justice PECKHAM and a jury.

It appeared upon the trial, that on the 4th day of October, 1793, Stephen Van Rensselaer and Abraham Peek, executed an indenture by which Stephen Van Rensselaer, in the usual form, granted lands in Rensselaer county to Peek, reserving rents, &c., to be paid at a time and place therein specified, and Peek covenanted to pay, with the usual clause, giving right to re-enter upon non-payment, default, &c. That default had been made, and the usual fifteen days' notice of intention to re-enter properly served before commencement of action. That the rights thus reserved to Van

Whyland v. Weaver.

Rensselaer, and all of Van Rensselaer's interest therein, had been duly transferred to, and vested in the plaintiff.

The answer conceded that the defendant held the lands described in the complaint. It also appeared that the defendant occupied the land; and there was oral evidence that he or his grantor had promised, within three or four years of the time of trial, to pay the rent. Upon the foregoing facts there was no conflict or contradiction.

The plaintiff based his right to recover upon the claim that 30 acres of the 129 acres conveyed from Van Rensselaer to Peek, (and which 30 acres was described in the complaint,) was in default in the payment of its proportion of the rent reserved.

The complaint alleged that this 30 acres was a part of the Christian Simmons farm — was formerly owned and possessed by him, and by his heirs at law, and was conveyed by them to Matthew Myers; and by the latter and wife conveyed to John D. and Silas Myers, who conveyed to the defendant.

The principal dispute upon the trial was, whether the said 30 acres was included in the lease from Van Rensselaer to Peek.

The judge at the circuit directed a verdict for the plaintiff, upon a case to be made and first heard at the General Term.

E. Wooster, for the plaintiff.

Colvin & Bingham, for the defendant.

By the Court, P. POTTER, J. On the trial, the plaintiff proved a conveyance from Stephen Van Rensselaer to Abraham Peek, dated in October, 1793, by lease in perpetuity reserving rents, with a fixed annual day of payment, and containing the usual provision of the right of re-entry upon default of payment. He also proved, as the case states, the interest of Van Rensselaer

Whyland v. Weaver.

to have come to, and become vested in the plaintiff, before the commencement of this action ; also, that the 30 acres described in the complaint was included within and a part of the lands described in the Peek lease. He proved possession of the premises for 25 or 30 years by a succession of occupants, as follows : Christian Simmons, who got possession of John M. Haynor and wife, of Christian Simmons by his heirs, then by Matthew Myers from the heirs of Simmons, and then by Silas D. Myers and John B. Myers, and from the latter to the defendant ; and that Silas D. Myers and Weaver admitted the premises in question were a part of the Peek lease. That rent was demanded of Weaver and Silas D. Myers while they were in possession, and at a time, some three or four years before the commencement of the action ; that they promised to pay it, but that it has never been paid. And the service of the fifteen days' notice upon the defendant was admitted.

Upon this proof, the plaintiff, when he rested, was entitled to recover.

The proof on the part of the defendant was four deeds, viz. : 1st. Deed from Joseph F. Simmons and Daniel C. Simmons and their wives, and Patience Simmons to Matthew Myers, in April, 1851, conveying divers parcels of land, and, among other parcels, that of 30 acres of land, being part of premises theretofore conveyed by Stephen Van Rensselaer to Standart and John Miller, and John C. Miller. In respect to the description of the premises, the boundaries were substantially the same as those described in the complaint. 2d. A deed from the said Joseph F. Simmons and Daniel C. Simmons as executors of Christian H. Simmons, to the said Matthew Myers, of the same premises, by the same description as in the last deed dated in April, 1851. 3d. A deed from Matthew Myers and wife to Silas D. Myers and John D. Myers, by the same description as to the premises, as in the two foregoing deeds, dated in February, 1861,

Whyland v. Weaver.

and 4th. A deed of the same description of premises as in the three foregoing deeds from Silas D. Myers and John D. Myers to him, defendant, dated in April, 1865.

These four deeds severally are made subject to the payment of rents reserved to Van Rensselaer, but each of them describe the premises as originally leased by Van Rensselaer to Standart Miller, John Miller and John C. Miller, without giving date to such original lease. The identification of the land is claimed by its description in these deeds, and as coming from Christian Simmons.

After a cross-examination of Mr. Wooster, one of the plaintiff's witnesses, by the defendant, he was re-examined by the plaintiff and asked, "What do you know about the Standart Miller, John Miller and John C. Miller lease?" Answer—"Could not find any such; there is no such lot of land lying in the neighborhood of this lease to-day by actual survey. I took Mr. Patton, surveyor from Troy, to-day, and I find that the lot described in the complaint lies in the boundaries of the Abram Peek lease." The defendant objected to this testimony as incompetent; the court overruled the objection, and the defendant excepted.

At the close of the testimony the defendant requested the court to hold and instruct the jury, that the evidence failed to show that the land owned by the defendant was any part of the land claimed by the plaintiff; and that the defendant was entitled to their verdict. The court refused to so hold and instruct the jury, and the defendant excepted.

The defendant then requested the court to submit the question to the jury upon the evidence in the case, to find whether the land, owned and occupied by the defendant, was the land claimed by the plaintiff, or any part thereof. The court refused to submit the question to the jury, and the defendant excepted.

The defendant then requested the court to hold that

Whyland v. Weaver.

the alleged rents had been released and discharged or extinguished, and the premises held adversely thereto by the defendant, and to so instruct the jury and direct a verdict for the defendant. The court refused to so hold and instruct the jury, and the defendant excepted.

The defendant then requested the court to submit the question to the jury, upon the evidence in the case, to find whether or not the premises were held by the defendant adversely to the claim of the plaintiff, and released and discharged of the rents claimed. The court refused to submit the question to the jury, and the defendant excepted.

The defendant then requested the court to decide as a matter of law, and to instruct the jury, that the plaintiff was not the owner of the premises claimed, and had no title thereto, and that the defendant was entitled to their verdict. The court refused to so hold and instruct, and the defendant excepted.

The defendant then requested the court to hold and instruct the jury, that the defendant was the owner of the premises in his occupation at the time of the commencement of the action, and entitled to a verdict in his favor. The court refused to so hold and instruct the jury, and the defendant excepted.

The defendant then requested the court to submit the evidence to the jury to find, as a question of fact, whether the plaintiff or the defendant was the owner of the premises at the commencement of the action. The court refused to submit the question to the jury, and the defendant excepted.

The court then instructed the jury that the plaintiff was entitled to recover possession of the premises, and the defendant excepted. The jury so returned their verdict as instructed; and the court ordered that judgment be entered thereon in favor of the plaintiff.

If we are to take the case as true, there was in proof a regular transfer of title and interest from Van Rens-

Whyland v. Weaver.

selaer in the Peek contract, which had come to and vested in the plaintiff before suit brought. This claim of title, with possession of the property, is, at least, *prima facie* evidence that the possession was under that title, and becomes *actual* evidence of the fact of possession under that title, when the last regular grantee in the line claims the title, and demands the rent reserved of the possessor, and receives from the tenant in possession a recognition of his right, by a promise from him to pay the rent.

What then is the evidence by which it is claimed that the plaintiff's title is overcome?

It is claimed by the defendant, through another chain of title, from the same common source. But in this he fails for want of connection with the common source. He traces this chain no farther back than to the heirs of Christian Simmons, in the years 1850 and 1851. True, those deeds do recite that the premises had theretofore been conveyed by Stephen Van Rensselaer, the common source of title, to the Millers; but this recital does not estop the plaintiff. He is not a privy in the estate flowing through that chain of title, if such title ever existed. The defendant, and his successive grantors, are strangers to the plaintiff's chain. To defeat the plaintiff he was bound to connect his grantors with the Peek estate, or to show that the land described in the complaint is no part of the Peek estate. He did not do this on the trial; and stopping when he did, he gave no evidence tending to prove either of these facts. He did not prove that the defendant or his grantors were privies in blood, privies in estate, or privies in law with the plaintiff and his grantors. And if, indeed, both chains of title could have been traced to the same source by regular lines of conveyance, it would doubtless have been necessary, even then, for the defendant to have shown his title was anterior in date, to that of the plaintiff, to have defeated him.

If we are right, in this view of the law, the judge cor-

Whyland v. Weaver.

rectly refused to charge the jury as asked, in the two first requests to charge.

In the defendant's third request of the judge, his proposition was compound ; "first, that the alleged rents had been released, discharged, or extinguished." There was no evidence of this in the case ; and the judge could not, therefore, so hold. This could only be done by the real owner. It could not be done except by Van Rensselaer, while he was the landlord, or by some grantee, heir, or assignee, afterwards. The other part of the defendant's request to charge, "that the premises were held adversely thereto by the defendant, and to so instruct the jury, and direct a verdict for the defendant," seems to be based upon the first part of the proposition, and must fall with it. The distinct question of adverse holding is presented in the next proposition to charge, which was also a compound proposition ; first, to submit it to the jury to find whether or not the premises were held by the defendant adversely to the claim of the plaintiff, and released and discharged of the rents. There was no such evidence in the case as would authorize the judge so to charge. The claim of the defendant, under title shown, was less than twenty years ; nor did he show its occupation, cultivation or improvement, as required by statute. He set up no claim of holding adversely, in his answer ; and according to section 81 of the Code, the plaintiff was to be presumed to have been in possession within the time required by law, and that the defendant was holding under his title. The judge correctly refused to charge and submit to the jury, as requested.

The three remaining propositions, which the judge was requested to charge, are without merit, and do not call for discussion. There was no conflict of fact in the evidence which required a submission to the jury.

The only remaining question, to be examined, is the overruling, by the judge, of the objection of the defend-

Whyland v. Weaver.

ant, of the testimony of Mr. Wooster, at the end of the case. The objection was general; it did not specify the portion objected to; and if it applies to all of his testimony, it was not good as a general objection, because a part of the testimony was unobjectionable. Besides, it was not a motion to strike out the evidence, but an objection to evidence already given, as incompetent. The testimony itself was competent, though the witness might not have been competent to give that character of evidence. The objection was not sufficiently specific, or in proper form, to meet the case. The same witness had in an earlier stage of the trial testified, in effect, to the same fact, and to which the like objection had been made; and I am inclined to think the testimony was without legal objection, if the objection was in due form. The witness had testified that he knew the location of the premises described in the Peek lease, and knew the adjoining lots. The lease before that had been in evidence. He was then asked whether the lot described in the complaint was a part of the Peek lease, and he answered that it was. This is a fact that any witness was legally competent to answer who was acquainted with the land, and the adjoining lands, its description and locality as connected with the other farms or monuments. I do not think there was any error in these rulings, if the objection had been made specific, and in due form.

I think the plaintiff is entitled to judgment.

MILLER, P. J., concurred.

PARKER, J., concurred in the result.

Judgment for the plaintiff.

[THIRD DEPARTMENT, GENERAL TERM at Binghamton, December 2, 1878. *Miller, P. Potter and Parker*, Justices.]

DESDEMONA CHERITREE vs. AARON ROGGEN.

In an action for libel, private letters, written to the plaintiff by the defendant, tending to show that the libel was published with hypocritical and vicious motives, are admissible to show malice. Malice can be shown by circumstances connected with facts.

In an action for publishing a libel which the defendant claimed had been sent to him, anonymously, through the post office, by some other person, with a request that he would send the same to the plaintiff, secretly, the defendant offered to prove, by a witness who was not an expert, that the address upon the envelope containing the libel was not in the handwriting of the defendant. *Held*, that this testimony was properly rejected; the best evidence, upon that subject, being the testimony of the defendant himself.

A witness cannot swear to general character, unless he knows it. This knowledge is a thing acquired by time, and by the general speech of the people who know, and who have the opportunity of knowing, and of forming an opinion from that knowledge.

THIS is an appeal from a judgment rendered at the Greene county circuit, and from an order denying a motion for a new trial.

The action was for libel, which consisted in sending two letters to one Mrs. Hurd, a sister of the plaintiff, containing indecent and unwarranted aspersions upon the plaintiff's conduct, and calculated to ruin her character. The first of these letters purports to be written at Oak Hill, August 23, 1867, and the last at Oak Hill, September 10, 1867. They were deposited in the post office at Oak Hill, and post-marked at or about the time they purport to bear date, inclosed in an envelope directed to Mrs. Hurd, at Oak Hill, who received them within a day or two thereafter.

The action was tried at a circuit court in Greene county, before a jury, who rendered a verdict in favor of the plaintiff for \$500. All the necessary and material facts are sufficiently stated in the opinion.

Olney & King, for the plaintiff.

Givens & Osborn, for the defendant.

By the Court, P. POTTER, J. So much of the motion, at Special Term, for a new trial, as was based upon the grounds of surprise and of newly discovered evidence was correctly disposed of by the judge. The opposing affidavits were contradictory to such an extent that the weight of evidence demanded the decision that was made, by the order appealed from. The other grounds of the motion are legitimately included in the appeal from the judgment upon the case made and settled for that purpose.

The action is for a libel. The language of the letters is clearly libellous; they had publication by the sending them to Mrs. Hurd, the sister of the plaintiff. And it is not controverted, now, that the defendant gave them circulation by sending them to Mrs. Hurd through the post office, so that the responsibility was thrown upon the defendant to defend, either by a justification, which he did not attempt, or to mitigate the damages by evidence of want of malice, or of acting with good intentions towards the plaintiff in the publication of the libels.

The defendant attempted to mitigate the damages, first, by showing that there existed nothing but kindness and good feeling between himself and the plaintiff; that there was a relationship between them, the plaintiff being the widow of the brother of the defendant's wife; that the parties were both members of the same church, the Episcopal, and the defendant an officer (warden) of the church. He further attempted to show that the two libellous notes were sent to him through the post office anonymously, with a request that he would send them to Mrs. Hurd, secretly; that he so sent them as requested, without knowing the contents.

Whether the defendant made out these defences or not, he was technically responsible for the publication of the libels; he put them in circulation to the prejudice of the plaintiff; he inflicted the injury, and was bound

Cheritree v. Roggen.

to atone for it ; severely if done with evil intent, with less severity if done innocently. The intent was a question for the jury. The opinion formed by the jury is made manifest by their verdict. There is evidence in the case, which, if believed by them, fully justified the verdict they rendered. The defendant insists the verdict is against the weight of evidence ; in this, doubtless, he means in its amount.

The plaintiff's counsel, on the trial, attempted to prove an evil motive on the part of the defendant, by showing that he attempted to prevent the plaintiff's removal from her residence in Greene county to Syracuse ; and that he had sought, on various occasions, to have private meetings himself with her, and promising her favors and presents if she would so meet him and consent to his wishes, from which it was attempted to deduce a reason for his desiring her to remain near him. This evidence and its deductions would only be legitimate upon the theory that the defendant himself wrote the libellous letters.

Upon the question of fact, whether the defendant himself wrote the letters in question, there was much evidence, and such a conflict of evidence as to carry the point beyond the duty of the court, to reverse a finding of a jury. Ten witnesses swore to the belief that the letters were in the defendant's handwriting. And while an equal number of witnesses were of a contrary opinion, it still presents a case in which no precedent could be found to authorize a court to reverse a finding of a jury as being against the weight of evidence, or if even against the weight, not against such a preponderance of weight as makes it the duty of a court of review to interfere ; and yet it must be conceded that, taking the defendant's side of the case alone, or perhaps looking at it with the eye of his counsel fully imbued with the good faith of his client, and weighing testimony with all the

sympathy begotten by that faith, it appears strange that a jury should have been so impressed.

The reviewing court looks upon the case divested of such sympathies, and is bound to follow well settled rules, established to control its action.

Our further duty in this case is to examine the rulings of the judge on the trial, and the exceptions thereto, and his charge to the jury and refusals to charge, and the exceptions taken, to see if any errors have been committed therein. The first objections raised on the argument, to the rulings of the judge, are his admissions of evidence given by the plaintiff, to prove propositions made by the defendant to the plaintiff by letter to meet him privately at designated places, and promising that she and her children should never want, &c.; to go with him to Clarksville, and to stay with him there while he was hunting, he proposing to pay her board; in his attempts also to dissuade her from going to Syracuse, &c. These letters had been destroyed, as the plaintiff testified, at the defendant's request. The counsel for the defendant objected to the contents of these letters, severally, as immaterial, irrelevant and incompetent; the objections were overruled, and the defendant excepted, and the motions to strike out the evidence of the contents of these letters severally were denied.

The contents of these letters could be proved by parol, after their destruction, if the contents were either material, relevant or competent. It appears to me that, taken altogether, these letters did contain relevant evidence. The matter charged as libellous had for its object, clearly, one of two things, either a motive to protect her character from a suspicion or charge of unchastity, or to prevent her departure from her then residence, and perhaps the latter motive, to prevent the former, but in both are found the distinct charge of unchaste conduct. At the time this evidence was offered, it had been proved that the defendant was

Cheritree v. Roggen.

certainly the publisher, and there was evidence of his being the writer of the libels. It would clearly be evidence of aggravation and malice, if it was shown that the defendant, in his private letters to her, had manifested no such high regard for her chastity, as the libels would seem to be the evidence of; or in other words, the libels were published with hypocritical and vicious motives. Malice can be shown by circumstances connected with facts.

The next objection is to the ruling of the judge upon the testimony of George C. Lee, a witness for the defendant. The counsel proposed to prove by this witness whether the envelopes, in which the libels came to the defendant, and the direction to the defendant inside of such envelopes, and the libellous letters, were all in the same handwriting. The objection was to the proof of the handwriting upon the envelopes directed to the defendant. The judge rejected the evidence, but not, as he stated, on the ground that the witness was not an expert. The objection to the testimony was sustained, and the defendant excepted. I think this ruling was right, by the law of evidence. If this proof would have helped the defendant's case, it would have a corresponding influence to injure that of the plaintiff. This was a kind of proof that the defendant himself could make, or equally well cause to be made by another for his own advantage; he would thus possess the advantage of manufacturing the evidence that would acquit him. The proof, therefore, that it was not the defendant's handwriting, by an expert, or person other than the defendant, ought not to be allowed. The best evidence would be the defendant himself, who might testify that he neither wrote it, *nor caused it to be written*; for if he did the latter, while he would be equally liable for the act, he might have the benefit of the evidence offered, and he, who only perhaps could inform whose handwriting it was, might omit to be

Cheritree v. Roggen.

sworn himself and secondary evidence be admitted. As the case then stood, I think the ruling was right. It would not at all follow that because the envelope was in the same or a different handwriting, the libel was not his. Upon the plaintiff's theory of the case, as it then stood proved, the defendant had concocted the libels, and had them placed in the post office, directed to himself, and had received them from the post office in the envelopes he had prepared. It was this theory which he was called upon to defend and disprove; it did not help to disprove it that the envelope was in any particular handwriting, nor that it was in the same handwriting as the libels.

The next, and only further objection to the ruling of the judge complained of, is that upon the questions put to a witness called to impeach Frank Graham, a witness for the plaintiff, as follows: Q. "Do you know this boy, Frank Graham?" A. "I know him by sight." Q. "Have you heard him talked about by the community?" A. "I did a year ago last summer." Q. "Have you heard people speak of his general character?" A. "I did then." Q. "From what people said of him, what is his general character, good or bad?" Court. "How long have you known him?" A. "I knew him then, I never saw him before or since until this court." Court. "How long before this trial?" A. "This was in 1867, in the month of June, a year ago last summer." Court. "Did you learn his general character?" A. "I don't know that I did." Court. "Was it at the place where you lived that you heard these people talk?" A. "No sir, that was at Oak Hill." Court. "How far is it from where you reside?" A. "Three miles and a half." Court. "I don't think that is general character at all. The transactions that arise and surround a particular case don't make general character." To which ruling and decision the defendant's counsel excepted. Counsel for defen-

Cheritree v. Roggen.

dant. "I propose to show that on a given day in 1867 numerous persons residing at Oak Hill stated in witness' hearing that Frank Graham's general character was bad." Court. "I don't think that it will do." And the court excluded the evidence so offered, and the defendant's counsel excepted.

It is a very simple proposition, and sound as it is simple, that a witness cannot swear to general character, unless he knows it. This knowledge is a thing acquired by time, and by the general speech of the people who know, and who have the opportunity of knowing and of forming an opinion from that knowledge. The witness neither knew the person attempted to be impeached, or his general character, nor was there any evidence that the person so speaking knew. If the fact that a few or a number of persons, on a single occasion, speak ill of another, in the absence of evidence that the persons so speaking knew the person they were speaking of, were sufficient to establish character, few persons could be found to pass that ordeal unharmed in reputation. The ruling of the judge was right.

There were no exceptions to the charge of the judge. On a full examination of the case I do not find any error that requires a reversal. The judgment should be affirmed, and also the order appealed from.

Judgment and order affirmed.

[THIRD DEPARTMENT, GENERAL TERM at Binghamton, December 2, 1878. *Miller, Potter and Parker*, Justices.]

AITKEN *vs.* MEYER.

The plaintiff, having in his possession certain papers upon which he claimed a lien for money loaned to P. & S. for the defendant, P. & S. borrowed of the defendant his check, and passed the same to the plaintiff to discharge the debt and obtain possession of the papers, the defendant knowing, at the time of delivering the check, that it was to be used by P. & S. *Held*, that these facts constituted the plaintiff a *bona fide* holder of the check.

Held, also, that it was entirely immaterial that the check was made payable to P. & S. That it was sufficient that the plaintiff had possession of papers upon which he claimed a lien, and that he took the check, and in consideration thereof delivered up the papers.

APPEAL, by the defendant, from a judgment entered upon the report of a referee. The action was upon a check made by the defendant, payable to the order of Peters & Schierloh, and indorsed by them to the plaintiff.

By the Court, PRATT, J. There is no exception to any finding of fact, and each fact found is material to the decision of the case. The plaintiff had in his possession certain papers upon which he claimed a lien for money loaned to Peters & Schierloh for the defendant, and the check in suit was borrowed by them of the defendant and passed to the plaintiff to discharge that debt and obtain possession of the papers. The defendant knew, when he delivered the check, that it was to be so used by Peters & Schierloh.

These facts constituted the plaintiff a *bona fide* holder of the check in suit. It is entirely immaterial that the check was made payable to Peters & Schierloh. It is sufficient that the plaintiff had possession of papers upon which he claimed a lien, and that he took the check, and in consideration thereof delivered up the papers.

The referee was correct in holding that the burthen of proof was upon the defendant, after the plaintiff had produced the check.

Neither are the exceptions to the admission of evidence well taken.

Pease v. Copp.

All the material facts are admitted or proved by evidence that is unobjectionable.

The judgment must be affirmed with costs.

Judgment affirmed.

[SECOND DEPARTMENT, GENERAL TERM at Brooklyn, December 8, 1873.
Barnard, Tappen and Pratt, Justices.]

PEASE vs. COPP.

Where, by the terms of an executory agreement, the delivery of goods is to be at a specified place, to a specified person, who, as between him and the buyer, is not authorized to inspect the goods, but has a general authority to receive, weigh and forward such goods as the purchaser sends, and goods are in fact received by the agent and by him consigned to another agent of the buyer, at a distant place for sale, the purchaser will be held to have accepted the goods, and is precluded, in the absence of fraud, from subsequently calling in question the quantity, or quality, of the property sold, in an action brought by the vendor, for the contract price.

It seems that it is the duty of the purchaser of an article of merchandise which, in its nature, is open to ready inspection, and which is, by the terms of the contract of sale, to be delivered at a specified place, to provide for the inspection of the commodity before it has been transported from the place of delivery, in pursuance of the buyer's directions.

The defendant contracted with the plaintiff for all the cheese the latter should make, in his dairy, during a specified term, the cheese to be delivered to A., an agent of the defendant at D., who had instructions from the defendant to receive such cheese as should be sent to him, and to weigh and forward the same to the defendant's agent or consignee, in New York, for sale. Under this contract a quantity of cheese was received from the plaintiff, by A., and was by him weighed and forwarded to New York in pursuance of the defendant's directions. *Held*, that there was a delivery and acceptance of the cheese. That it was an article that could be inspected, and its quality ascertained; and this should have been done, at A.'s warehouse. And that after the goods had been accepted by the purchaser's agent, and forwarded to New York, it was too late for the defendant to raise any question as to the quality of the cheese.

APPEAL, by the defendant, from a judgment entered upon the report of a referee.

The action was brought to recover a balance of pur-

Pease v. Copp.

chase-money claimed as due upon a sale and purchase of a quantity of cheese. The complaint alleged the sale and delivery by the plaintiff to the defendant, at divers times during the summer and fall of the year 1857, of large quantities of cheese, at a specified price per pound. The answer, in addition to a general denial of the alleged contract, and a plea of payment, set up an agreement between the parties that such cheese as should be delivered by the plaintiff should be of a good and merchantable quality, and charged a breach of such agreement, and alleged that the cheese which had been delivered was of little or no value. The answer also contained a plea of accord and satisfaction.

On the hearing before the referee, the plaintiff proved that an executory agreement was entered into, between the parties, in August, 1857, by which the defendant agreed to take, of the plaintiff, such cheeses as he then had on hand, to the number of about seventy, and such others as he should thereafter make in his dairy prior to the 20th day of October of that season; for all of which the defendant was to pay at the rate of nine cents per pound. The cheese was to be put up in boxes by the plaintiff and to be delivered as soon as it should become four weeks old, at the warehouse of George M. Abell in Dunkirk, the price to be paid on delivery. The cheese was shown to have been taken to the place designated in the contract, in parcels, at different times during the summer and fall of the same year. The last load, consisting of thirty-three boxes, weighing 3,087 pounds, was deposited at the warehouse on the 27th of November, 1857. Abell was present at the time, and gave his receipt in the following form:

“Received from H. G. Pease, in store, for T. D. Copp, thirty-three boxes cheese. 33 boxes, 3,391—304.

Nov. 27, 1857.

GEO. M. ABELL.”

The giving of the receipt in evidence was objected to by the defendant as hearsay evidence, but the objection

Pease v. Copp.

was overruled. The cheese was, shortly after delivery, forwarded by Abell to the defendant's consignee in New York for sale; some of it was marked "forward," at the time of delivery, by Abell. The business of Abell was that of a forwarder at Dunkirk. It was admitted by the parties that all of the cheese, excepting the last lot, had been paid for by the defendant at the contract price; and that Abell was the agent of the defendant to receive the cheese. The delivery of the last load was shown to have been delayed by the plaintiff in pursuance of instructions on the part of the defendant. The defendant was extensively engaged as a buyer of butter and cheese in the county of Chautauqua. There never had been any offer to return any part of the cheese delivered.

The defendant then offered to show on a cross-examination of the plaintiff, who had been made a witness in his own behalf, that the quality of the cheese last delivered was bad, and that it had been manufactured after the 1st day of October, a time which the defendant claimed, and offered to prove, was the limit of the period for making cheese under the contract. The plaintiff objected to the evidence, on the ground that an acceptance of the cheese by the defendant had precluded him from objecting to its quantity or quality; and that the offered evidence was therefore inadmissible. The court sustained the objection.

The plaintiff having rested his case, the defendant testified on his part, and introduced other evidence to show, that the contract made between the parties only included the cheese made prior to October 1st. He then made several offers of evidence to which the plaintiff objected, and which the referee finally consented to hear, under a ruling that if he should ultimately decide that the evidence was incompetent it should be considered as excluded by him under the objections made, reserving to the defendant his privilege of exception. The defendant then gave evidence that the last thirty-

Pease v. Copp.

three boxes of cheese were badly cured, and a portion of the contents were made after October 1st. That Abell was a forwarder; that his authority was to receive such cheese as the defendant sent him, to weigh it and forward it to its destination; that the defendant got information, in December, 1857, from his consignee in New York, that this lot of cheese which had been sent was unmerchantable; that soon after the receipt of this intelligence, on meeting the plaintiff, he directed his attention to the matter. The plaintiff had called to arrange for the payment of a note and told him to go on and pay the note, and he would do what was right about the cheese. The agency of the consignee in New York was proved to have been nothing more than that of a general commission merchant. The general quality of fall cheese was shown to be inferior to that of summer cheese; and this particular lot was sold, in the April ensuing, for one cent per pound. All of this evidence was heard subject to the objection previously mentioned on the part of the plaintiff, to the effect that an acceptance of the cheese had in fact taken place, and that the private relations and dealings of the defendant with his agents, and the final results of his purchases as profitable or otherwise were irrelevant; and that the conversation with the plaintiff was immaterial for the same reason. The referee decided to exclude the evidence which had been conditionally admitted, and ordered judgment in favor of the plaintiff for \$177.83, the price of the thirty-three boxes of cheese, with interest on that amount to the date of the report.

Obed Edson, for the appellant. I. The referee erred in finding that the cheese had been accepted by the defendant at the contract price. In a contract for the sale and delivery of an article at a future day, merchantable quality, such as will at least bring the average market price, is always intended and warranted. In executory

Pease v. Copp.

sales the rule of *caveat venditor*, and not of *caveat emptor*, applies. (*Howard v. Ryckman*, 23 Wend., 350. 9 Wend. 28. *Hargous v. Stone*, 1 Selden, 86.)

If the article of merchandise sold and delivered under an executory contract is accepted by the purchaser, he is undoubtedly bound to the contract price, (as in *Sprague v. Blake*, 20 Wend., 61;) otherwise, however, if there is no acceptance under the contract or at the contract price. (17 Wend., 277. 18 Wend., 462-463. *Kings v. Paddock*, 18 Johns. R., 141-144.)

The purchaser has always, after the delivery and receipt of merchandise, a reasonable time in which to inspect it, and if within such time he gives notice of the defect there is no waiver of his right to object to the quantity, or quality. (23 Wend., 350. *Ely v. O'Leary*, 2 E. D. Smith, 355.)

The facts in this case do not show that there was any inspection or acceptance of the cheese by the defendant, or by Abell, to whom it was delivered. Abell was a mere forwarder, had no authority to inspect, and did not inspect or examine the cheese. The defendant had no knowledge of the character or quality of the article delivered.

II. The question of acceptance is one of fact, depending upon the intention of the buyer, the nature of the goods, the opportunities for inspection, and the varying circumstances of the case. It was a disputed and material question, and the referee should have heard all the evidence bearing upon it. (See 2 *Parsons on Contracts*, 324; 23 Wend., 350.)

The referee should not have excluded the defendant's testimony as to the value and quality of the cheese.

James A. Allen, for the respondent. I. None of the cheese was made by the plaintiff after the contract time had expired. The referee finds as fact, that cheese was to be taken by the defendant to the 20th of October.

Pease v. Copp.

II. There was an acceptance of the cheese by the defendant. Receipts were given to the plaintiff by the agent, for the cheese, "as in store for T. D. Copp." It was shipped soon after by the agent to New York, to the defendant's consignee, without objection. There was never any offer to return the cheese. It was sold in March or April, 1858. The acceptance may be by an agent as well as by the principal. (*Sprague v. Blake*, 20 *Wend.*, 61.) An acceptance takes place when the buyer performs any act manifesting an intention to retain possession of the goods. (*Hunt v. Hecht*, 20 *Eng. L. & E.*, 524, *per Martin*, B. 2 *Parsons on Cont.*, 324, 327 *n.*) He has no right to even passively retain the goods beyond the time necessary to examine them. (2 *Pars. on Cont.*, 325.) A consignment by the agent to whom delivery is made, to another agent of the defendant, amounts to an acceptance. (*Snow v. Warner*, 10 *Met.*, 132.) Acceptance may be inferred from mere lapse of time in not returning the goods. *Bushnell v. Wheeler*, 15 *Q. B.*, 442. *Parsons on Cont.*, 329 *n.*) In this case no objection is pretended to have been made for months after delivery. On the authority of *Sprague v. Blake* (20 *Wend.*, 63), there was an acceptance in this case at the time of the delivery. (See also *Dodsley v. Vadey*, 12 *Ad. & Ell.*, 634; *Story on Con.*, § 792, *p.* 869.) The question of acceptance under the statute of frauds is identical with that at common law in respect to the right of objection on the score of quantity or quality. (*Outwater v. Dodge*, 6 *Wend.*, 397. *Smith v. Surman*, 9 *B. & Cr.*, 561, 577. *Norman v. Phillips*, 14 *M. & W.*, 271. *Howe v. Palmer*, 3 *B. & Ald.*, 321. *Hanson v. Armitage*, 5 *B. & Ald.*, 557. *Acebal v. Levy*, 10 *Bing.*, 376. *Cunliffe v. Harrison*, 6 *Exch.*, 903. *Curtis v. Paugh*, 10 *Q. B.*, 111. *Story on Con.*, § 790.) If the cheese had been accepted, evidence of its quality was irrelevant. If it be urged that there was no binding acceptance of the cheese made after the 1st of October,

Pease v. Copp.

because the defendant, as he alleges, made no contract for cheese manufactured after that time, the objection is one merely to quantity. It is not denied that the defendant purchased the cheese up to October 1st, but he claims to repudiate as an excess what was made after that time. The claim is merely that *more* cheese has been delivered than was bought. It is well settled that an objection on the score of *quantity* must be taken before acceptance. (*Story on Con.*, § 790. 2 *Kent's Com.*, 8th ed., note 1, and cases cited. See cases above cited.) Quantity and quality are classed in the same category, and an acceptance is conclusive on the right to object to either. It may be said that the acceptance was without knowledge of the excess. If the plaintiff was bound to communicate the fact of the cheese being made after October 1st, the defendant's remedy, if he has one against him, is on a warranty or in fraud. And neither warranty nor fraud is alleged in the answer. If the plaintiff was not bound to communicate the fact, then the defendant's acceptance of the cheese is final. An inspection of the cheese would have disclosed the fact if there were late made cheese. Or if he, the defendant, were not satisfied in respect to the quantity, he could have put himself on inquiry. The fact was one which he could easily ascertain. In no event could the defendant avail himself of this objection without a special count in his answer, claiming recoupment on the ground of the cheese having been made after the 1st of October.

By the Court, MARVIN, J. The action was brought to recover a balance claimed to be owing and due to the plaintiff for cheese sold at a price stipulated, and delivered in 1857.

There are exceptions to the findings of facts by the referee. I have carefully read the evidence. There was evidence tending to prove all the material facts found

by the referee, and there was evidence upon some of the issues tending to prove the contrary. The findings are not so against evidence as to justify the court in interfering. The conclusion of law from the facts found was correct. This brings us to the exceptions taken during the trial to the admission and rejection of evidence.

The contract as claimed by the plaintiff was a sale of the plaintiff's cheese then made, and all to be made by the 20th of October following, and to be delivered after the cheese was a month old, at Dunkirk. The defendant claimed that the contract only included the cheese made up to the first of October. The contract price was nine cents a pound. The plaintiff quit making cheese the 10th or 12th of October. He delivered the cheese made up to that time at the warehouse of Abell in Dunkirk, and to Abell, who was an agent of defendant for receiving cheese. The last delivery was Nov. 27, 1857,—33 boxes, 3,087 pounds. The value of this, at the contract price, was \$277.88. The plaintiff had previously delivered 8,157 pounds; this had been paid for, and also \$100, as the plaintiff conceded, on account of the 3,087 pounds of cheese, before this action commenced, leaving as the plaintiff claimed \$177.83 still due. The action was commenced in December, 1858. The defendant claimed that he had paid the plaintiff in full, or rather that he had settled with the plaintiff matters in dispute between them growing out of the contract and its performance, and had paid him in full under circumstances that would amount to an accord and satisfaction.

The evidence upon this question was heard, and the referee found against the positions of the defendant.

The cheese was delivered by the plaintiff to Abell at his warehouse in Dunkirk and shipped by him to the commission agents of the defendant in New York, for sale. The cheese was in boxes. It does not appear that the cheese was examined, either by the defendant or

Pease v. Copp.

Abell, at the time it was delivered to Abell, or before it was shipped to New York.

The defendant saw the cheese that was made and in the dairy in August, about the time he made the contract to purchase.

The defendant then offered to prove that the cheese in question was not of a merchantable quality, and that it was not made during the time mentioned in the contract. Such proof was objected to, and the evidence was excluded, and the defendant excepted.

The defendant also offered to prove what was said in a conversation between the plaintiff and defendant, in August, 1858, respecting the quality of the cheese. Objection was made; the referee received the evidence with the understanding that he should, before making a final decision of the cause, decide whether it was admissible; that the party against whom the question was decided might except. The referee finally sustained the objection, and the defendant excepted. The evidence then given conditionally was: The plaintiff said the cheese was not cured as it should be [should have been], he was sorry it was not cured more. The defendant claimed [in the conversation] that all the thirty-three boxes were made after the contract expired [meaning Oct. 1st]; he said he thought not more than one-half of them.

The defendant also offered to prove what constituted Mr. Abell's agency, and how far it extended in receiving the cheese. This was objected to and disposed of the same manner as the objections above. The evidence taken and finally rejected, was from the defendant: "I employed him to receive, weigh and forward cheese to its destination. His authority was merely to receive such cheese as I sent to him."

The defendant, in substance, offered to prove that the defendant got information from New York that the cheese was not merchantable and could not be sold; that it was

Pease v. Copp.

not cured; that such information was received in December, 1857. The evidence was, upon objection, rejected, and the defendant excepted.

The defendant offered to prove that he communicated to the plaintiff that the cheese was not good, and that the plaintiff said, "go on and pay the note and plaintiff would do what was right about the cheese;" that the parties were talking about the price of the cheese. Excluded, upon objection, and the defendant excepted. There were several other offers of evidence to show the agency of the consignee in New York; the character of the cheese, as to quality, made late in the fall; the value of cheese made after October 1st. The evidence was rejected, and the defendant excepted. It is not necessary to state the case further. The referee reports in favor of the plaintiff for the value of all the cheese delivered at Abell's and forwarded to New York, at the contract price. The counsel for the defendant makes the point that the referee erred in finding that there was any acceptance of and liability for the cheese in question by the defendant at the contract price, and insists upon the exceptions. Also in finding that the plaintiff was not fully paid, &c.

The referee found that by the contract the cheese was to be delivered in Dunkirk at the warehouse of Abell. That Abell was a forwarding merchant and the agent of the defendant to receive the delivery of the cheese; that the plaintiff delivered the cheese, and Abell received it. These facts being so, the referee, in rejecting the evidence of the quality of the cheese, held that such evidence, in the absence of fraud, could not affect the plaintiff's right to recover. The contract was executory. The cheese was delivered at the place designated by the contract, and there was a man there who received it. I do not think it very material to ascertain what precise authority Abell had from the defendant touching any inspection of the cheese; he had authority, as all the evidence shows, to receive the cheese, weigh and forward it—

Pease v. Copp.

such cheese as the defendant sent to him. This is from the evidence of the defendant which the referee finally excluded. I refer to it as showing that Abell's authority was sufficient, as the defendant states it; and rejecting this evidence could not change the case. It is true that the defendant says Abell's authority was merely to receive such cheese as he sent to him. By the contract the cheese was to be delivered at the warehouse of Abell, and it was the duty of the defendant to be there in person to receive it, or have an agent there for that purpose. The defendant was a large purchaser of cheese to be delivered at Abell's warehouse. He did not attend there in person, but Abell received cheese brought there, and forwarded it. In this case he received the cheese and sent it to New York to the agents of the defendant, for sale. I have no doubt, within all the authorities, that it must be held that there was a delivery and acceptance of the cheese. It was an article that could be inspected, and its quality ascertained, and this should have been done at Abell's warehouse. The defendant had no right himself or by his agent to take the plaintiff's cheese and send it to New York, and then on finding that it was not of the quality the contract called for, take the position that there had been no delivery, or that the title had not passed. In this case there was no proof that the defendant ever offered to return the cheese. But I have no doubt he must be held to have accepted it when it was delivered at the place specified in the contract and there received by Abell, his agent, and forwarded to New York. It was then too late to raise any question as to its quality, as it was an article that could have been readily inspected and its quality ascertained.

The judgment must be affirmed.

Judgment affirmed.

[ERIE GENERAL TERM, February, 1860. *Greene, Marvin and Davis*, Justices.]

STAFFORD *vs.* POOLER.

Where a purchaser is bound, by the contract, to inspect and accept or reject the property, at the time and place of delivery, the offer to return, if the property does not conform to the contract, must be then and there made.

Where an offer is made, to do an act at a place other than the one at which the law or the contract requires it to be done, and the refusal is in terms which show an intent not to accept performance anywhere, the offer will be held sufficient. But when the offer is such that the party to whom it is made is not bound to accept any part of it, a refusal which does not, in terms, preclude any further attempt at performance, does not dispense with a performance.

Where a party offers to perform some of a series of acts which the law requires to be done in order to discharge a duty or establish a right, and the offer is refused in such terms as to satisfy a court or jury that the party would not accept anything offered, a further offer is excused.

The plaintiff agreed to deliver to the defendant, at C., 200,000 hoops, at \$3.50 per M. The hoops were to be well rived ash hoops, and of specified dimensions. Payments were to be made from time to time, as a certain number should be delivered. The plaintiff delivered 203,100 hoops to the defendant, at C., in bundles claimed to contain 100 hoops, each. After some 30,000 of the hoops had been delivered, it was mutually agreed that the hoops should be inspected; but no time or place, or person, when, where and by whom such inspection should be made was agreed upon. The defendant sold the hoops so bought of the plaintiff to a salt company, and shipped those delivered, by canal, to S. At that place, an agent of the salt company inspected some fifty bundles and found them short in number, and defective in quality, so that there were but fifty-eight merchantable hoops in a bundle. The defendant then offered to return said hoops to the plaintiff, at S., provided he would pay \$152, the freight charges thereon, and the advances made to the plaintiff. This offer was refused, the plaintiff saying he could not take them back, and the defendant might do as he pleased with them. The defendant's agent examined some three hundred bundles of said hoops, at S., including those examined by the inspector, and found that they did not contain over fifty well rived ash hoops to the bundle, the residue being worthless. No inspection was made at C. In an action to recover the balance of the purchase price of the hoops, remaining unpaid:

Held, 1. That the defendant was not entitled to damages for any deficiency in quantity, or defect in quality, of the hoops.

2. That the property was, by the terms of the contract, to be delivered at C., and when delivered there, it was the duty of the defendant to examine it, and promptly to accept or reject it.

3. That the subsequent agreement, that the hoops should be inspected, without designating any time when, place where, or person by whom, such inspection should be made, did not alter the original contract, except by relieving the defendant from inspecting at the very time of delivery.

Stafford v. Pooler.

4. That as the hoops were to be delivered at C., the inspection must be held to have been intended to be made at C.
 5. That unless the plaintiff assented to an inspection at S., the acceptance at C., and shipment of the hoops to S. without the knowledge or assent of the plaintiff, was such a retention of the property as amounted to an admission that it was accepted in satisfaction of the contract.
 6. That if there was not an acceptance of the hoops, so as to preclude the defendant from alleging and proving non-performance on the part of the plaintiff, there was no offer to return, within the principle of *Read v. Randall* (29 N. Y., 358.)
 7. That the property being deliverable and to be accepted at C., the offer to return it at S., on payment of charges, was not such an offer as the plaintiff was bound to accept. And that the refusal to accept was not so broad and unequivocal as to cure any defect in the offer.
 8. That the plaintiff was bound by a custom, existing at C., of inspecting a part of the whole quantity and to arrive at the quality and quantity of the whole by the average thus ascertained. But that the inspection of a part of the hoops, at S., was not conclusive evidence of the condition of the whole. And that the referee was right in finding that those only were to be taken to be defective that were actually examined.
 9. That the inspection at S. did not bind the plaintiff; and besides, it came too late, the property then having passed from the plaintiff to the defendant.
 10. That evidence of the making of a second agreement between the parties for the delivery by the plaintiff of more hoops, after the defendant knew of the defects in those previously purchased, was admissible to rebut the testimony of the witnesses, as to the bad quality of the former lot.
- It was found, by the referee, that only three hundred bundles of the whole quantity of hoops were actually inspected; and these being found to be but one-half, or 15,000 of them conforming to the contract, the referee deducted, by way of damages to the defendant, \$52.50, being the value of 15,000 hoops at \$3.50 per thousand. *Held*, that the defendant was allowed, by the referee, for all the damages proved, on the facts found by him.

THIS was an action brought to recover the balance unpaid of the price of 203,100 hoops, which the plaintiff agreed to manufacture and deliver to the defendant at Carthage, in the county of Jefferson, at \$3.50 per thousand. The hoops were to be well rived ash hoops, and of specified dimensions. Payments were to be made by instalments; that is, from time to time as a certain number should be delivered. The contract was dated Dec. 8, 1862, and was for 200,000 hoops.

During the months of January, February and March,

Stafford v. Pooler.

1863, the plaintiff delivered the above mentioned quantity of hoops to the defendant, at Carthage, at a place indicated by the latter, in bundles containing, as he claimed, 100 hoops each.

The defendant set up in his answer, by way of defence, that after the making of the contract and on the 8th Dec., 1862, it was agreed between the parties that said hoops should be inspected at Syracuse, and that the plaintiff would be bound by such inspection. This agreement was denied by the plaintiff, and the referee found, as matter of fact, that no such agreement was made; except that about the 2d of February, 1863, and after some 30,000 of the hoops had been delivered at Carthage, it was mutually talked and understood that the hoops should be inspected in reference to their quality, but no time or place or person was agreed upon when, where and by whom such inspection should be made.

The defendant sold the hoops bought of the plaintiff to the salt company, at Syracuse, and on the 1st of May, 1863, shipped said hoops, together with 127,000 purchased of other persons, by canal, to Syracuse. At that place an agent of, and a stockholder in, said salt company, inspected some fifty bundles of said hoops, and found them short in number and defective in quality; so that there were but fifty-eight merchantable hoops in a bundle. The result of this inspection was communicated to the defendant, who afterwards informed the plaintiff thereof, and offered to return the said hoops to the plaintiff, at Syracuse, provided he would pay to the defendant \$152, the expense of transporting said hoops to that place and the advances made by the defendant, thereon, to the plaintiff. This offer was refused, the plaintiff saying he could not take them back, and the defendant might do with them as he pleased. He insisted the hoops were good, and demanded the balance of his pay. The defendant's agent

Stafford v. Pooler.

examined some three hundred bundles of said hoops, at Syracuse, including the fifty examined by the inspector, and found that the hoops so examined did not contain to exceed fifty well rived ash hoops to the bundle, and the residue of each bundle were worthless.

The referee found a general custom at Carthage, as well as at Syracuse, to inspect occasionally a bundle and average the quantity by the result of such inspection.

The referee reported in favor of the plaintiff for the contract price of the hoops, less the amount paid to him by the defendant and \$52.50, being the deficiency in quantity and quality of the 15,000 hoops inspected.

It was conceded, on the argument, that there was an error of \$100 in the amount found due, by the referee, which was to be deducted.

There were several other questions raised, on the trial, which are referred to in the opinion of the court.

The defendant appealed from the judgment entered on the report of the referee.

Jas. F. Starbuck, for the appellant. I. The offer to return the hoops, as found by the referee, takes the case out of the embarrassment by which the plaintiff was defeated in *Reed v. Randall*, (29 N. Y., 358.) There, the only embarrassment was the want of an offer to return.

- II. The offer to return does not need to be pleaded. We allege breach of our contract and claim damages
- for such breach. The offer to return is merely *evidence* in support of our claim, and hence need not be pleaded. But if we are wrong in this, no such question can be made here. The proof is given, and the fact is found.

Levi Brown, for the respondent. I. The plaintiff was entitled to payment for full contract price, less payments, and the \$27.47 counter claim. 1st. The property was delivered, and after ample time and opportunity to inspect and offer to return, it *was accepted* by defen-

Stafford v. Pooler.

dant without any notice or offer to plaintiff, and was removed more than a hundred miles from the place of delivery, and sold and delivered to a third party. (*Reed v. Randall*, 29 *N. Y.*, 358, 362, 363, 364. *Sprague v. Blake*, 20 *Wend.*, 61.) 2d. The arrangement (if any was made subsequent to contract and partial delivery) as to inspection, must be held to have contemplated an inspection, if at all, before defendant received, disposed of and removed the property; after which, an inspection would be too late, not being in pursuance of the arrangement, and must be held to have been previously made or waived by defendant. His subsequent inspection at Syracuse, and pretended offer to return, were therefore of no avail. (*See cases above cited, and Milnor v. Tucker*, 1 *Car. & Payne*, 15; *Fisher v. Samuda*, 1 *Camp.*, 190.) 3d. There is no warranty. A warranty cannot be predicated upon the contract alleged in the complaint. (29 *N. Y.*, 361, 362.) 4th. Defendant has never offered to return the property. If it had not been too late to make such offer, he should have returned or offered to return the property to plaintiff, and put him in the position he found him. The offer to return the property at Syracuse was no offer, within the rule. (30 *Barb.*, 20, 23. 31 *Barb.*, 171, 183, and cases cited.) Again, it was bad for the reason that it was conditional. (19 *N. Y.*, 262, 267.)

II. In any event, the defendant could not be entitled to more damages than he proved. He inspected 300 bundles. There is no evidence that the other 1,700 bundles were defective, or if they were, to what extent, and as to a large portion of the hoops there is *proof that they were good*.

By the Court, MULLIN, J. It was held by the Court of Appeals, in *Reed v. Randall* (29 *N. Y.*, 358,) that in cases of executory contracts for the sale and delivery of personal property, the purchaser must return, or offer to

return the property if, on inspection, it does not correspond with the contract, and that the retention of the property by the purchaser, after an opportunity for inspection, is an admission on his part that the contract has been performed.

Applying these principles to this case, it is quite clear that the defendant was not entitled to damages for any deficiency in quantity, or defect in quality, of the hoops.

The property was, by the terms of the contract, to be delivered at Carthage, and when delivered there, it was the duty of the defendant to examine it, and promptly to accept or reject it. (*Chitty on Contracts*, 460, &c.)

The subsequent agreement, that the hoops should be inspected, with reference to their quality, without designating any time when, place where, or person by whom, such inspection should be made, does not alter the original contract, except by relieving the defendant from inspecting at the very time of delivery. The hoops were still to be delivered at Carthage. The inspection must be held to have been intended to be made at Carthage; and whether the inspection was to be made by a licensed inspector, or by a person acquainted with such property, is not very material, as no inspection is pretended at Carthage — at any time.

Unless the plaintiff assented to an inspection at Syracuse, (which is not found by the referee,) the acceptance at Carthage and shipment of the hoops to Syracuse without the knowledge or assent of the plaintiff, is such a retention of the property as amounts to an admission that it was accepted in satisfaction of the contract. (*Chitty on Cont.*, 461-2.)

If it should be held that there was not an acceptance of the hoops, so as to preclude the defendant from alleging and proving non-performance on the part of the plaintiff, I am of the opinion that there was no offer to return, within the principle of *Reed v. Randall*, (*supra*.)

When the purchaser is bound by the contract, to in-

Stafford v. Pooler.

spect and accept or reject the property at the time and place of delivery, the offer to return, if the property does not conform to the contract, must be then and there made. It would be most unjust to the vendor to permit the purchaser to ship the property to some distant place and to require him there to receive it back and repay to the vendee the expense of its transportation. (*Ward v. Gaunt*, 6 *Duer*, 257.) So, too, when an offer is made, to do an act at a place other than the one at which the law or the contract requires it to be done, and the refusal is in terms which show an intent not to accept performance, anywhere, the offer will be held sufficient. But when the offer is such that the party to whom it is made is not bound to accept any part of it, a refusal which does not, in terms, preclude any further attempt at performance, does not dispense with a performance.

If, in this case, it had been found that there was an agreement that the property should be inspected at Syracuse, that would then be the place of performance; and if the vendor had delivered property not such as was called for by the contract, he should bear the expense of the transportation, as his own misconduct had led to the expenditure.

When, however, the property was deliverable and to be accepted or rejected at Carthage, an offer to return at Syracuse, on payment of charges, is not such an offer as the plaintiff was bound to accept.

The referee is of the opinion that the refusal to accept was so broad and unequivocal as to cure any defect in the offer. In this I cannot concur with him. When the offer was made, the plaintiff was bound to accept or reject it. He did reject it, promptly and emphatically, and he was justified in doing so. The defendant had not yet made the offer he was bound to make in order to enable him to recover damages. Nor did he intimate that he would deliver at any other place, or upon any other terms than such as he then offered. When a

Stafford v. Pooler.

party offers to perform some of a series of acts which the law requires to be done in order to discharge a duty or establish a right, and the offer is refused in such terms as to satisfy a court or jury that the party would not accept anything offered, a further offer is excused.

If it should be held that the defendant had done enough to entitle him to be allowed for the inferior quality of the hoops and deficiency in number, I am of the opinion that he was allowed, by the referee, for all the damages proved, on the facts found by him. It is found that only 300 bundles of the whole quantity were actually inspected; and as these were found to be but one half, or 15,000 of them answering the description called for by the contract, the referee deducted, by way of damage to the defendant, \$52.50, being the value of 15,000 hoops at \$3.50 per thousand. The defendant insists that it was the duty of the referee to have found, upon this evidence, that the plaintiff delivered but one half of the whole nominal quantity actually delivered. In other words, that as it was the custom to count but a few of the whole number of bundles of hoops, and from them to determine the quality of the whole quantity, and as out of 30,000 examined, only half were such as answered the contract, it followed, and the referee was bound to find, that but one half of the whole quantity delivered by the plaintiff conformed to the contract.

The plaintiff was bound by the custom at Carthage, of inspecting a part of the whole quantity, and to arrive at the quality and quantity of the whole by the average thus ascertained. Had the inspection been made at Carthage, I have no doubt the average of the bundles examined would have determined the character of the whole. But no such inspection was then made; and an inspection of a part, made at Syracuse, would not be conclusive evidence of the quality of the whole, but would be persuasive evidence of the condition of the

Stafford v. Pooler.

whole; and from the condition of the part inspected, the referee might infer the condition of all. The inspection at Carthage not being proved, the evidence of the condition of a part was not conclusive as to the condition of the whole. And upon all the facts before him, I think he was right in finding that those, only, were to be taken to be defective that were actually examined.

But the trouble is, the inspection at Syracuse did not bind the plaintiff; and besides, it came too late. When it was made, the property had passed from the plaintiff to the defendant.

Again; it is by no means certain that either Nutting, the inspector at Syracuse, or McCollom, confined their inspection to the hoops delivered by the plaintiff. There was room for mistake in attempting to distinguish those delivered by the plaintiff from the 127,000 sold to the defendant by other parties. At all events, the fact that there was this additional quantity on the boat, detracts very much from the weight which might otherwise be given to the inspection.

The finding of the custom of inspecting a part of the hoops delivered and averaging the residue, disposes of the point made by the appellant, that proof of such a custom was improperly rejected. While the evidence offered was rejected, the fact proposed to be proved is found by the referee.

The plaintiff offered in evidence a contract between the parties for the sale of all the hoops manufactured by the plaintiff during the season of 1863, at \$3.75. This agreement was dated April 2d, 1863. The evidence was objected to by the defendant's counsel, but the objection was overruled, and the defendant's counsel excepted. The plaintiff's counsel did not disclose the object he had in view in giving this evidence; and we are therefore left to conjecture as to the reasons which induced the referee to receive it. The only pur-

Stafford v. Pooler.

pose for which it would seem to me it could be claimed to be competent would be to rebut the evidence of McCollom and others as to the bad quality of the hoops; the argument being that if the hoops delivered on the former contract were defective, it would not be probable that a new contract for the same article would have been made, with full knowledge of the bad condition of the former lot. I am unable to perceive why this was not competent evidence. If the defendant himself had been on the stand, and had sworn that the hoops delivered on the former contract were defective, it would have been competent to inquire of him whether he did not make a new contract, for more of the same article, after he knew of the defects in those previously purchased. If he had answered in the affirmative, the fact would have gone very far towards destroying his evidence. The defendant was not sworn, but he set up, as a defence, and examined witnesses to prove, that the hoops delivered on the former contract were defective, notwithstanding he had made a new contract for the same article, with the plaintiff, after he knew of the very bad condition of the hoops previously delivered. It was evidence tending to rebut the defence.

But, if it was not competent, it was wholly immaterial, if the defendant could not, on the case made by him, recover damages for the defective condition of the hoops.

The defendant's counsel excepts to the finding of the referee that the price of the hoops, after deducting \$52.50 for damages, was \$758.30. The ground of this exception, I presume, is, that by mistake in calculation, the referee has made the price \$100 too much; and this exception is therefore well taken. If it was intended by the counsel, by this exception, to assail the finding as improper in any other respect, I think it is not well taken, for the reasons already stated.

There is another exception to the amount found due

Stafford v. Pooler.

to the plaintiff; and as this, also, is \$100 too much, it is well taken.

The counsel and the referee have called the deduction of \$52.50, made by the referee, damages allowed for the defective quality of the hoops. But I do not perceive how it can be called damages, or an allowance to the defendant for any purpose. The plaintiff was bound to deliver 200,000 well rived ash hoops, of given dimensions. Upon inspection, after delivery of 30,000 of them, only 15,000 were found to answer the contract. The plaintiff was therefore entitled to recover for 15,000, instead of 30,000. Limiting the recovery to 15,000 was merely holding the plaintiff to the performance of his contract. The whole quantity called for by the contract not being delivered, the defendant was entitled to *recoup* such damages as he sustained by reason of such non-delivery; and these damages would be the difference between the contract price and the market price at the time of delivery. For this (the only damage actually sustained, by the defendant,) no allowance whatever was made. But no question was made, in regard to it, before the referee, and as a consequence, no question can be raised, upon it, on this appeal.

I am of opinion that the judgment of the referee should be reversed; unless the plaintiff shall stipulate to deduct from the same \$100, as of the date of its entry. If such stipulation is given, then the judgment must be affirmed, without costs of appeal to either party.

Judgment accordingly.

[ONONDAGA GENERAL TERM, January 1, 1867. Bacon, Foster and Mullin, Justices.]

BURNET *vs.* BAGG.

When a piece of land in a city is dedicated by the owners to the public for the purposes of a park or square, the city, if it accepts the dedication, becomes seised of it, not in fee, but in trust for the public, charged with the duty of preventing its appropriation to any other uses than such as the donors intended, and of securing to the public the enjoyment of the benefits which it was designed to confer.

Unless a private person, living in a corporation in which land has been dedicated for a public use, has acquired in some legal way an interest in such easement, from the person dedicating the land, he cannot maintain an action against a person or corporation interfering with or disturbing such easement; unless he sustains thereby some special and peculiar damage, which is not sustained by the great mass of the inhabitants.

It would be a breach of the trust under which a city holds land, dedicated to the public for the purposes of a park or square, to permit it to be appropriated to private use; much more to expressly permit such appropriation. A breach of trust is never presumed. *Per* MULLIN, J.

The benefits afforded by a public park or square, are those of light, air, prospect and of a public promenade. Inclosing and planting trees upon land so dedicated, does not interfere with the enjoyment by an individual of any of the benefits the laying out of a park or square was intended to confer.

A triangular piece of land in the city of Syracuse having been, by the owners, dedicated to the public for the purposes of a park or square, and accepted by the city, the defendant asked, and obtained permission, from the common council, "to set shade-trees on, and to inclose, a portion of the triangle with a suitable fence." *Held*, that if, under this permission, the defendant should attempt to appropriate the triangle to his own use, an individual citizen could maintain an action against the defendant and the city, to prevent it. But that until that was done, or attempted, he could not maintain such an action.

APPEAL, by the plaintiff, from a judgment entered at a Special Term, on a trial by the court without a jury, dismissing the complaint in this action.

The triangular piece of ground which is the subject of controversy in this suit, was owned in fee by the Syracuse Company, so called. That company conveyed all the land owned by them in the city of Syracuse, including the triangle in question, to the plaintiff and Gideon Hawley, in trust for the said owners, and the plaintiff was authorized to sell and convey said lands. The plaintiff laid out said lands into lots and streets, and finding

Burnet v. Bagg.

that the triangle in question would be of more value to the owners if set apart as an open square, park or highway, did dedicate and set it apart for that purpose. The defendant owns the land on the east side of it, and the west wall of his dwelling house comes up to the east line of said triangle. Hawley street bounds said lot on the west and south, and James street on the north. The plaintiff owns a lot on the west side of Hawley street, on which his dwelling house is erected, and he owns a lot south of the triangle, lying between Hawley and Townsend streets, which come together just south of said triangle. On the last mentioned lot, the plaintiff has erected a barn, which is used by himself and his son.

This triangle, together with the land now occupied by the defendant, was for many years uninclosed and unoccupied except as a pasture for cattle running at large in the streets. While it was thus lying open as a common, and after the defendant had inclosed his lot, the triangle was travelled over by teams and people on foot, in all directions, at pleasure. The defendant, desiring to make it somewhat ornamental, applied to the common council of Syracuse for permission to inclose it with a fence, and to plant trees upon it, and it was granted; and he was proceeding to inclose and plant it with trees when this action was commenced and a temporary injunction obtained.

The plaintiff, in his complaint, alleges that this triangle was dedicated to the public for the benefit of the surrounding lands owned and sold by the Syracuse Company, and that to inclose it will deprive the plaintiff of the right to travel over it in going to and from Hawley and Townsend streets, and greatly injure the value of his lands in that vicinity, for business purposes.

The court found, as conclusions of law:

1. That the defendant was duly authorized by law to make the improvements contemplated by him, and that

Burnet v. Bagg.

the said improvements were consistent with the use for which said grounds were dedicated.

2. That if said improvements were unauthorized, yet the plaintiff could not maintain this action, for the reason that he would sustain no special damage, in case said improvements were made.

He therefore directed judgment dismissing the complaint, and directing the injunction to be dissolved with costs.(a)

(a) The following opinion was given, by the justice before whom the action was tried, at Special Term :

BACON, J. The counsel for the plaintiff in the argument submitted by them, present this case in two aspects, neither of which, I am persuaded, was within the contemplation of the plaintiff or his legal advisers, when the action was brought. It is now insisted that the title to the *locus in quo* is in the plaintiff, and has never by any act of his been divested, and that the encroachment complained of is an infringement of his rights in the subject matters which he is authorized to protect and vindicate, or that he holds the title in trust for certain other parties, whose rights have been trespassed upon, and he appears on their behalf, and substantially to rescue from perversion, what they intended for the public good, while subserving their own interests.

But a glance at the complaint shows conclusively that on neither of these theories was the action founded, or can for a moment be sustained. The complaint sets up no title whatever, either in the plaintiff in his own right, or as trustee for any other parties. On the contrary, in the very commencement it avers that "the land embraced in block thirty-two (on which the triangle in question is located) was *formerly* held by the plaintiff as trustee of the Syracuse Company," &c. It then proceeds to describe the premises, and avers that the same "has been dedicated as public grounds and easement, and highway, and as such has been accepted and used by the public, and used and occupied as such for over twenty years, &c., and as an open area for the health, pleasure and accommodation of the public." The complaint proceeds to set forth, in substance, that the plaintiff is the owner of adjoining lands on Hawley and Townsend streets, and resides near said ground, and that the same has been used more or less in connection with said streets; that the right of crossing the triangle is of great pecuniary benefit and value to the lands of plaintiff on said streets, and the obstruction of it will greatly injure the value of his lands, and that of others in that vicinity; and after describing the acts of the defendant in reference to the inclosure and improvement of the triangle, which it is alleged are for his own private use and benefit, and which are calculated to exclude the plaintiff and the public therefrom, and to greatly *injure the property* and infringe on the rights of the plaintiff and others, the plaintiff asks an injunction to restrain the defendant from further prosecuting his proposed im-

Burnet v. Bagg.

Mr. Burdick, for the appellant. I. A man may dedicate lands for any lawful purpose that he may choose. 1. He may dedicate lands for a street; 2. He may dedicate land for a park; 3. He may dedicate it for a church or school house site; 4. For cemetery purposes;

improvements, the object of which is averred to be to injure the property of the plaintiff, and prevent the free use of the premises as public grounds and easement aforesaid.

This is the case as presented in the pleadings, and the proof given on the trial was adapted entirely to this view. While it was directed in part to show that the public had an easement in the privilege of passing over the premises and the right to enjoy them as an open area for health and recreation, it was mainly, and in its prominent aspects confined to the injury it is alleged to inflict upon the plaintiff in his private interests, and in the pecuniary damage to his adjacent property. There is no allegation of a trusteeship, in the matter, and no allusion to any *cestui que trust*, whose rights or interests are supposed to be either directly or remotely affected, and no interposition is asked in their behalf. The action, if it is to be upheld, must be sustained either on behalf of the general public, or on behalf of the plaintiff personally, as a matter of private interest, and on the score of special pecuniary damage to him. I am of opinion that it cannot be sustained on either ground.

I. To the maintenance of the action by the plaintiff on behalf of the public, there are several decisive objections. In the first place I do not understand that a private citizen has any power to come into court representing the interests of the body public, or the general public, and ask that through him as their representative, their rights may be vindicated, and an alleged violation of them restrained. In the second place, in respect to the object sought here, the corporate authorities of the city of Syracuse are the proper representatives of the public, and if a wrong has been done to property situated as this is, or its use and enjoyment have been prevented, they should appear, either as plaintiffs, to vindicate the public right, or if they have concurred in the alleged wrong and refuse to act, be made defendant in the suit.

But the conclusive answer to this assumed ground is, that the corporate authorities having power and jurisdiction in the premises, have by formal and regular official action, sanctioned and authorized the doing of the things from which the defendant here is sought to be restrained. It is clear, both upon the pleadings and the proof, that the triangle in question was surrendered and dedicated to the public, and as the plaintiff alleges, more than twenty years ago. It was never inclosed as a public park or grounds for recreation, but left open and pretty much derelict, for purposes of indiscriminate passage, and as a common for cattle and animals running at large. No highway was ever laid out, or road thrown up or worked through it, but men and teams passed over it generally on one route, but on other occasions indiscriminately, and, as one of the witnesses states, "all over it." It subserved in that condition no use by

Burnet v. Bagg.

and, 5. For an open public square. By a park or cemetery an inclosure is contemplated, and is consistent with the dedication. Not so a street, or open square, highway easement. An inclosure defeats the object of the dedication, and is not consistent with it. (22 *Wend.*, 472; *note*, p. 425; 11 *id.*, 503.)

way of ornament, or for recreation, but was merely a convenience by way of shortening the transit around the upper angle. Under the surrender and dedication, such as it is described and shown to have been, I entertain no doubt but that the authorities of Syracuse, representing the public, could, if they pleased, have laid out a highway on the premises, or caused the *locus in quo* to be improved and ornamented as a park or pleasure ground for the benefit and recreation of the citizens, for this would be entirely consistent with the object of the dedication. Moreover, by various provisions of the city charter, power is given to the common council to regulate the planting of shade trees in the streets and upon the parks and grounds of the city; to regulate and improve the public grounds; as commissioners of highways they have power to lay out, open, regulate, repair and improve highways, streets and public grounds in the city. What they have power to do, they have power to order or authorize to be done, and to constitute an agency for that purpose. Accordingly upon the petition of the defendant, the common council of Syracuse, in May, 1864, by resolutions duly passed, authorized the defendant to make the improvements suggested in his petition, and upon which he was engaged when arrested by the injunction order issued in this suit. These improvements were in accordance with the authority given him, and it clearly appears that they were not with the object attributed to him by the plaintiff, to wit, the annexation of the property to his own adjoining premises, and the appropriation of the same to his own individual use and benefit, and to the exclusion of the public and the plaintiff therefrom; but that he proposed, and was proceeding to inclose, ornament and improve the same as a park, for the use and benefit of the public, and under the sanction of the public authorities — a power and privilege not granted absolutely and for all time, but subject still to the control of the authorities, and to be used and enjoyed only during the pleasure of the city. It seems to me, therefore, there can be no doubt that there was ample power imparted to the defendant to make the improvement in the mode adopted by him. If some consequential damage should result to the plaintiff, he cannot, by an action in his own name, restrain the doing of that which is authorized by competent municipal authority. (*Chapman v. Albany and Sch. R. R. Co.*, 10 *Barb.*, 369. *Ratcliffe's Ex'r v. Mayor &c. of Brooklyn*, 4 *N. Y.*, 195.) These authorities are, in my judgment, decisive against the maintenance of this action, and shield the defendant from liability in this suit.

II. There is another difficulty in the way of the plaintiff, which seems to me insuperable, even upon the concession that the act of the defendant was unauthorized by any competent power, but was an unjustifiable invasion of

Burnet v. Bagg.

II. When a dedication is made, the purpose cannot be changed. For instance, if lands are dedicated for a park, the municipal authorities of a city or village have no power to change it to a school house or church, or other public building purposes, or a street, and espe-

the rights of the public in the premises. I have already said that this suit can only be maintained, if at all by the plaintiff, to redress a personal wrong, and recover the damages, if any, he has sustained, and this is undoubtedly the theory upon which the suit was instituted. This being so, it is well settled upon numerous authorities, that no action at law or in equity can be maintained by a private person, except upon clear proof of special injury to him, irrespective of, and distinct from that which he sustains in common with the community, or the public specially affected by the alleged wrong. Thus in *Lansing v. Smith* (2 Cow., 151,) the court say that "for a common nuisance an action cannot be sustained, except by a person who has suffered some *special damage*. The law gives no private remedy except for a private wrong." The same principle is applied by Ch. J. Shaw in *Smith v. City of Boston* (7 Cush., 254,) to the case of a plaintiff who complained of injury to his property by the discontinuance of a street. The injury, he says, was one experienced by him in common with the rest of the community, and therefore not remediable by a suit in his name. To authorize any interposition in his behalf, he must suffer a special and peculiar damage, not common to the public. And this is precisely the ground on which the injunction was granted by Chancellor Kent in *Corning v. Lowrey* (6 John. Ch., 439-40,) distinguishing the case, as he says, from that of the *Attorney-General v. Utica Ins. Co.*, "inasmuch as there was a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not merely a common or public nuisance, but worked a *special injury* to the plaintiffs." (See also *Parsons v. Travis*, 1 Duer, 449; *Dougherty v. Bunting*, 1 Sand. S. C. Rep., 1.)

The plaintiff in this suit has made out no case of special damages to his own property, or any real impediment to his pleasant and profitable enjoyment of it. I have no doubt he has persuaded himself, and conscientiously believes, that his property is to be affected by the fact that this ground is not to be kept open as a common thoroughfare for men and animals to straggle and pass on indiscriminately, without care, cultivation or ornament, and that the prospect from his barn, if at some future time it shall happen to be otherwise occupied and improved, will be injuriously interfered with. But even in his own estimation, his damages are mostly, if not entirely prospective, and such is clearly the opinion of his son John Burnet, while the witness Wilkinson says expressly that for business *eventually* he thinks the change proposed to be made by the defendant, would injure the plaintiff's premises on block 36, but not at present, nor at all for a residence. It is quite clear, as it seems to me, that the injuries which the plaintiff has fixed his mind upon, are entirely fanciful and speculative, and if they are ever to have existence, are remote and

Burnet v. Bagg.

cially without following the strict authority, and paying a just compensation to the owner of the fee, and then in a manner prescribed by law. (16 *N. Y.*, 97, 108, 109, 111; 12 *Wend.*, 98.)

III. The municipal authorities of the city of Syracuse neither had power to authorize, nor are they in any way responsible for the acts of the defendant. The common council simply permitted, gave a license to defendant to make the inclosure and set the trees. They took no action or steps in the matter, but merely granted the prayer of defendant's petition. The acts complained of are not within the authority conferred by the city charter on the common council. (*Walker v. Caywood*, 31 *N. Y.*, 51, 63. 2 *Barb.*, 577, 581.)

IV. The inclosing of this triangle was an individual act of the defendant, and for his own personal benefit. His petition is signed by no one but himself, does not ask it for any one but himself, and then for a temporary or uncertain time, only during the pleasure of the city. The city authorities do not lay it out as a park, or for any object as a public work. They neither order, locate nor direct it; neither assumed any control or responsibility in the matter, nor intended to; they granted

contingent. They are not present and actual, and therefore afford no ground for an action to redress, or for an appeal to the court by the exercise of its restraining power by injunction to prevent.

On the other hand, the proof is overwhelming, and by half a dozen witnesses, men of judgment and discrimination, acquainted with the value of real estate, and nearly all of them residing in the immediate neighborhood of the premises in question, that the contemplated improvement by the defendant will not only be a great public benefit, but that instead of injuring the adjacent property of the plaintiff, it would be a decided advantage to him, and actually increase the value of his real estate in the neighborhood. My own judgment concurs with that of these witnesses, and my conviction clearly is, that not the public merely, but the plaintiff will be benefited by the proposed change, and that he will live to see and enjoy its ultimate fruition and development. Under such a state of facts it seems to me impossible to maintain this suit, and the result is that the injunction must be dissolved, and the complaint dismissed with costs.

Burnet v. Bagg.

a license to the defendant, whose purpose was to annex the area of land to his residence, and excluding the plaintiff as well as others of the public therefrom.

V. If the city authorities intended to inclose these grounds and to exclude the plaintiff and others, and the public, we insist it is in conflict with and a *subversion* of the *dedication*, and they acted without authority; and the acts of the defendant are unjustifiable. He proposes permanently to continue to obstruct and prevent the free ingress and egress to and from the same by the plaintiff, and not only defeat the objects of the dedication, but arrogate to himself, and for his individual benefit, that part of the lands dedicated, and destroy the benefits to the property of the plaintiff. (19 *N. Y.*, 256.)

VI. Any pecuniary injury to the plaintiff, no matter how small, by depriving him of a vested right, subjecting him to loss of time or money, imposing additional burdens, obstructing his right of way, is an injury to private right, and he is entitled to the aid of a court of equity to restrain the doing, and a continuance of illegal acts. (22 *Barb.*, 414, 420, 497.)

VII. The learned judge erred in his conclusions of law. 1. In holding that the common council had authority and power to authorize the defendant to do the act complained of. They cannot change the width of a street by authorizing a number of feet to be inclosed for a court yard. Any person owning property on such street may restrain it by injunction. (2 *Barb. R.*, 577. 4 *Paige*, 515.) Nor occupy it for any purpose, except that of travel. (11 *Barb.*, 390.)

VIII. The case made is clearly within the province of the court to grant the relief demanded. A threatened permanent or continuing injury is sufficient ground for an injunction. (2 *Story's Equity*, §§ 920, 923 and 927, p. 258.)

IX. The learned judge erred in finding there was an

Burnet v. Bagg.

acceptance of the dedication. No *evidence* of any acceptance, or official action given on the trial. Neither the city nor village authorities ever took any action in relation to any acceptance of the dedication. (6 *N. Y.*, 257.)

X. The fee of the triangle is in the plaintiff, and he is entitled to protect the reserved rights in the fee, and prevent any perversion of the objects of the dedication. (3 *Hill*, 483.)

Chas. Andrews, for the respondent. I. The plaintiff stands in the same position, in respect to the remedy in this action, as though the deed of trust from James and others to the plaintiff and Gideon Hawley in 1825, had never been executed. The plaintiff can claim nothing in this action, under or through that conveyance. 1. That conveyance conveyed the lands embraced therein, to Moses D. Burnet and Gideon Hawley, to be held in "joint tenancy and not as tenants in common," with power to Burnet to convey upon the written approval of Mr. James, during his life, and with a like power to Mr. Hawley after Burnet's death. If an action could be maintained by the *owners of the fee* of the land to restrain any use inconsistent with the purpose of the dedication, yet, such action must be brought by the trustees jointly, and does not lie in favor of the plaintiff alone. (4 *Kent's Com.*, 11th ed., 360. 5 *Paige*, 542.) 2. The action is not brought upon the theory that the plaintiff, by reason of ownership of the soil, has rights which have been invaded by the defendant. The plaintiff in his complaint asserts no claim as trustee or in behalf of the beneficiaries in the trust. No title to the *locus in quo* is alleged in the plaintiff. 3. The purposes of the trust having been accomplished, the legal estate has reverted in the grantors who created it. (*Nicholl v. Walworth*, 5 *Denio*, 385.)

II. The complaint avers the dedication of the triangle

Burnet v. Bagg.

in question to the public, "as public grounds, easement and highway." It devolved upon the corporate authorities of the city of Syracuse, as representatives of the public, to control and regulate the use, in any manner not inconsistent with the purpose of the dedication. (*Trustees of Watertown v. Cowen*, 4 Paige, 510. *Commonwealth v. Albenger*, 1 Wharton, 469. 2 *Smith's Leading Cases*, 218, 222. 5 Paige, 454.) This right would from necessity exist in the corporation without special statutory authority. It is also given by the charter. (*Laws 1857, ch. 63.*)

III. The authority given by the common council to the defendant, to improve the triangle in question, and to inclose it for the purpose of a public park, was consistent with the use for which the land was dedicated, and the defendant could lawfully exercise the authority granted, as the agent of the corporation. 1. The purpose of the dedication of the land in question, as alleged and proved, allows any use to be made which shall not interfere with its character as "public grounds, easement or highway." 2. A public park or square is a highway, within the legal meaning of that term. (*Com. v. Fish*, 8 Met., 238. *State v. Wilkinson*, 2 Verm., 480. 2 *Smith's Leading Cases*, 222. 2 *Ohio Rep.*, 107.) 3. It appears, by the complaint and by the proof, that the triangle is bounded by streets, and is not within the limits of any street as used and travelled. 4. The use to which public grounds may be appropriated may vary from time to time, as public convenience may require, so that the new use shall not be substantially inconsistent with the purposes of the dedication.

IV. If the common council had authority to authorize the proposed improvement, then no action can be maintained by the plaintiff, although he may be injured thereby. The common council having authority to act, the propriety of its action cannot be questioned. (*Williams v. N. Y. Central R. R. Co.*, 18 Barb., 247. *Davis*

 Burnet v. Bagg.

v. *Mayor, &c.*, 4 *Ker.*, 515. *Chapman v. Albany and Schenectady R. R. Co.*, 10 *Barb.*, 360.)

V. If, however, the proposed act of the defendant was unauthorized, yet the plaintiff cannot maintain this action, as it appears from the proof, and is found by the referee, that he will sustain *no special damages* therefrom. This fact must be alleged and proved, to entitle the plaintiff to an injunction. (*Corning v. Lowerre*, 6 *John. Ch.*, 439. *Dougherty v. Bunting*, 1 *Sand.*, 1. *Parsons v. Travis*, 1 *Duer's R.*, 449. *Davis v. Mayor*, 4 *Ker.*, 526. *Lansing v. Smith*, 8 *Cow.*, 151. *Smith v. City of Boston*, 7 *Cush.*, 254. 2 *Story's Eq.*, §§ 924, 925. *Washb. on Easem.*, § 569. 7 *Cush.*, 510.) Nor will the court interfere by injunction in a case of what may be regarded as an *eventual* or *contingent* nuisance. (*Ld. Brougham in 3d Mylne & Keene*, 169.)

By the Court, MULLIN, J. The triangle in question was dedicated to the public for the purposes of a park or square, and the city of Syracuse, if it accepted the dedication, became seised of it, not in fee, but in trust for the public, charged with the duty of preventing its appropriation to any other uses than such as the donors intended, and of securing to the public the enjoyment of the benefits which it was designed to confer. (*Village of Watertown v. Cowen*, 4 *Paige*, 510. *Anderson v. Rochester &c. R. R. Co.*, 9 *How. Pr. Rep.*, 553.)

Unless a private person, living in a corporation in which land has been dedicated for a public use, has acquired in some legal way an interest in such easement, from the person dedicating the land, he cannot maintain an action against a person or corporation interfering with or disturbing such easement; unless he sustains thereby some special and peculiar damage, which is not sustained by the great mass of the inhabitants. (*See cases cited, supra.*)

In *Anderson v. Rochester &c. R. R. Co.* (9 *How.*,

Burnet v. Bagg.

561) the defendant had instituted proceedings under the general railroad act, to acquire the right to lay its track through a public square in the city of Rochester, a part of which had been dedicated to the public for the purposes of a public square, and a part had been purchased by the city, for the same purpose. A large portion of the price had been assessed upon the owners of lots fronting on the square. The plaintiffs were such owners, and commenced the action to restrain the defendant from laying its track on the square, upon the ground that it would be injurious to the property of such owners. It was also claimed by the plaintiffs that if the track should be laid in the square it could only be upon payment to the plaintiffs of damages for the injury they should sustain thereby. An injunction was granted, but on appeal to the General Term it was vacated. SELDEN, J., lays down the following propositions, which apply, in all their force, to the case before us.

1st. That when land is dedicated to the public use the fee remains in the original proprietors, and the public acquire an easement, merely, coextensive with the purposes to which they were intended to be appropriated ; and if there is a corporation to represent the public, the easement vests in such corporation, which thus becomes a trustee of a use.

2d. That the owners of lots fronting on the square not having had conveyed to them an interest or easement in the square, acquired no interest or easement therein, separate and distinct from that held by the corporation in trust for all the citizens.

3d. If the trustee in trusts of a public nature violates its duty by authorizing an encroachment upon the rights of the public, any of the citizens as *cestuis que trust*, may institute a suit against such trustee, to enforce the trust. But none of the beneficiaries of the trust can proceed in their own names, against a stranger

Burnet v. Bagg.

to the trust, except when the acts of such stranger are productive of some special injury to the parties complaining not common to all the *cestuis que trust*.

4th. That the location of the track of the defendant's road in the public square was not such a special injury to the plaintiffs as entitled them to maintain the action.

5th. That the benefits afforded by a public square are those of light, air, prospect and of a public promenade; and that the track of the defendant, if laid and used by its engines and cars, was not such an interference with the enjoyment of either of these benefits as a court of equity would prohibit by injunction. (*Lawrence v. Mayor &c. of New York*, 2 Barb., 577. *Corning v. Lowerre*, 6 John. Ch., 439. *Drake v. Hudson River R. R. Co.*, 7 Barb., 508.)

In the *Fishmongers' Co. v. East India Co.*, (1 Dick., 164,) the Lord Chancellor dismissed the plaintiff's bill, filed to procure an injunction restraining the erection of a statue of George the 3d on a triangular piece of land in front of the plaintiff's premises in the city of London, where several streets met, as calculated to lessen the value of the plaintiff's premises. The chancellor held that the statue would not be a *public* nuisance, as it did not obstruct the carriage way; that it would be beneficial to the public. It was quite immaterial, he said, whether a majority of the inhabitants of the neighboring houses do or do not object to the erection of the statue—that if its erection did lessen the value of property fronting on the triangle, it was not such a description of private nuisance as would justify the interference of the court on that ground.

If the cases cited be law, the plaintiff cannot maintain this action, because,

1st. Inclosing, and planting trees upon, the land in question does not interfere with the enjoyment by the plaintiff of any of the benefits the laying out of the square was intended to confer.

The only possible enjoyment which inclosing and planting trees could interfere with would be that of prospect. Those of light, air and promenade are in no respect interfered with. And as to the prospect, it seems to me quite obvious that, so far from its being injured, it is largely improved.

But very little, if any, benefit would be conferred by dedicating to the public a piece of ground to be left uninclosed—to be travelled over *ad libitum* by persons and carriages—a common resort for all the stray cattle of the vicinage. Such a place would soon become impassable—offensive to the senses. It would be, in itself, a public nuisance.

The length of this triangle on James street is, I believe, about seventy-five feet; Hawley street is sixty feet; making, together, 135 feet. If this space is to be kept open as a street over which persons may pass at pleasure, and the city should accept it for that purpose, it would be its duty to keep it in repair. It would be no small burthen to keep such a street in proper condition for travel; and I very much doubt whether any corporation would accept of such a gift, charged with such a burthen.

But it was never intended, by those who dedicated this triangle to the public, that it should be so used. It was their purpose to furnish a place which might be inclosed and protected against the inroads of cattle, planted with trees, shrubbery and flowers—a spot pleasant to the eye and an ornament to the street. If the streets in the vicinity had been so narrow as to require for the accommodation of the public or adjoining owners, a larger space for travel, it might be inferred that the object of the dedication was to enlarge the passage way for teams, &c.; but there is no such necessity apparent or proved. And in the absence of evidence of such a purpose on the part of those dedicating the land, we must presume that they intended that it might and would become a beautiful

Burnet v. Bagg.

park, a place affording pleasure to all who might look upon it or enjoy its shade, and not a disgrace to those who gave it, and the people for whose benefit it was given.

It is suggested that the city, in granting the request of the defendant for leave to inclose the triangle, gave him the right to appropriate it to his own use, to the exclusion altogether of the public.

I do not think that the transaction between the defendant and the city is open to such a construction. The defendant's request was, to be permitted "*to set shade trees on, and to inclose a portion of the triangle with a suitable fence.*" And this was the permission granted.

It would be a breach of the trust under which the city holds the land in question to permit it to be appropriated to private use; much more to expressly permit such appropriation. A breach of trust is never presumed. (1 *Cowen & Hill's Notes*, 298, 367-8.)

The presumption may be fairly and reasonably, consistently with the language of the request on the one side, and the resolution granting it on the other, construed to mean a permission to the defendant to inclose, and plant trees upon, said triangle to be used as a public park, for the benefit of the public; and that the defendant's reason for making the request and assuming the expense, was to render a place adjoining his dwelling house, that from the mere want of improvement was not pleasant to the eye, and therefore lessened the enjoyment to be derived from his own premises, a pleasant little public park. If the defendant thus improved it, the public derive the same benefit from it they would have done had the city performed the same service; and they were relieved from the expense.

But if, under the permission thus granted, the defendant should attempt to appropriate this triangle to his own use, the plaintiff could maintain an action against the defendant and the city, to prevent it. But until

Kennedy v. Oswego and Syracuse R. R. Co.

that is done, or attempted, he cannot maintain such an action. (*See cases cited.*)

The court finds that the plaintiff has not sustained any such special damage as entitles him to maintain this suit. While this is rather a finding of a matter of law than a fact, still, within the cases cited, his finding is right. Being compelled to walk or drive a few rods further, by reason of inclosing this triangle, is not an injury which the plaintiff sustains alone. Every person passing from Townsend or Hawley street has the same additional distance to pass over. The depreciation of property is not of itself sufficient to enable the plaintiff to sustain the action. If so, there is no improvement of modern times, the erection or construction of which may not be prevented; as there is none which does not injuriously affect the pecuniary interests of some persons more than others.

As these are the only grounds suggested for sustaining the action, I the judgment of the Special Term was right, and should be affirmed.

Judgment affirmed, with costs.

[ONONDAGA GENERAL TERM, April 2, 1867. *Morgan, Bacon, Foster and Mullin*, Justices.]

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BRADFORD KENNEDY vs. THE OSWEGO AND SYRACUSE
RAILROAD COMPANY.

When a contract is made for the purchase and sale of a given number of cords of wood, the vendor is bound to deliver, and the vendee is entitled to receive, 128 cubic feet for each cord of wood so contracted for.

Usage has prescribed the number of feet each cord shall contain; and in the absence of an agreement or of a custom that a less number of feet shall constitute a cord, the usage applies to, and controls, the agreement.

Upon a contract for the purchase of a specified number of cords of wood which the purchaser is informed is but three feet long, he is not bound to accept of a pile of such wood eight feet long and four feet high, as a cord.

Kennedy v. Oswego and Syracuse R. R. Co.

When the known length of the wood is the only circumstance that can be relied upon in support of an implied agreement to take wood, less than four feet long, upon the contract, as if it were four feet, that fact alone is not sufficient to establish such an agreement.

All the facts known to the parties at the making of the contract, or the delivery of the wood, are to be considered, in determining whether there was a contract to purchase wood, only three feet long, as if it were the proper length. They are competent to go to the jury, and from them it may infer such an agreement.

When fire wood or timber is purchased for some specific purpose, which requires it to be of a certain length, if wood of a length different from that contracted for is delivered and received, the contract is satisfied. But when the contract is for wood for being burned, and the contract does not define the length, it may be longer or shorter than four feet; but the vendor must deliver 128 cubic feet, for a cord.

In the absence of any notice that an acceptance of wood, only three feet long, would be considered an acceptance of it as if it were four feet long, the acceptance and use of it by the vendee will not estop him from insisting upon a full cord.

There was a conflict of evidence as to the making of an express agreement between the parties that, to avoid any trouble about measuring the wood, if the purchaser would take it at its length, the vendor would take four dollars per cord, for it. *Held*, that this was a question of fact for the jury and should have been submitted to them.

Where, upon the evidence, the court had the right to find that the defendant, by its agent, agreed to take, upon a contract, wood only three feet in length, as if it were four feet long, provided the plaintiff would take four dollars per cord, therefor; *held* that, the court thus finding, the defendant was bound by the act of the agent; and that there was a sufficient consideration for the agreement.

The defendant's counsel excepted to a direction to the jury to find a verdict for the plaintiff, but did not ask that any question of fact should be submitted to it. *Held*, that such a request was necessary, in order to enable him to get the benefit of the error in the direction.

It can make no difference, in principle, whether the court directs a nonsuit or orders a verdict. In either case, it is the duty of the court to submit conflicting evidence to the jury, if requested so to do. But, in the absence of a request, the court may itself pass upon the facts; and when it does so, the parties will be deemed to have acquiesced in the action of the court.

A memorandum is not received to corroborate a witness who does not recollect the facts, independent of it, but to recall the facts if he has forgotten them. Where the witness may resort to it to refresh his recollection, it may be read in evidence. But unless it becomes necessary for this purpose, it is wholly incompetent.

The defendant proved that one of its agents drew up a writing setting out the

Kennedy v. Oswego and Syracuse R. R. Co.

terms of an agreement for the sale and purchase of wood; that he presented it to the plaintiff's agent who made the contract, who said it was correct, but he wished the plaintiff's name in it instead of his own. It was never signed by either party. *Held*, that the paper was not evidence to show the terms of the contract.

The case of *Guy v. Mead* (22 N.Y., 463,) distinguished.

MOTION for a new trial, on a case containing exceptions, which were ordered to be heard in the first instance at the General Term.

The plaintiff claimed to recover for 2,438 cords of wood at four dollars per cord, less \$8,000 which had been paid by the defendant. The defendant denied that it had purchased or received that quantity of wood from the plaintiff, and alleged that it purchased only 2,000 cords, and that the wood delivered actually amounted to only 2,091½ cords. The defendant also alleged that the wood was not of the quality specified in the contract for its purchase, and was not piled according to the agreement. The plaintiff introduced evidence tending to show that in December, 1864, he had a quantity of wood cut and piled a short distance from the Fulton depot, on the defendant's road. That the defendant's agents examined the wood before negotiating for its purchase, and finally agreed to take it at its length and pay four dollars per cord. Dorastus Kellogg, the plaintiff's agent, testified that the agreement was made about the middle of December; that 1,600 or 1,700 cords of wood were then cut, and that some two weeks after, the agent of the defendant told him that he might deliver 2,500 cords. That the wood was drawn and piled along the railroad, near the Fulton depot, in January, February and March, 1865. That as the wood was being drawn the defendant's agents directed the teamsters when and where to pile it, and that they piled it accordingly. That on the 24th day of April, 1865, the agents of the parties met to measure the wood. That Wade, the deputy superintendent of the defendant's road, while

Kennedy v. Oswego and Syracuse R. R. Co.

assisting in the measurement, objected that the wood was short, (meaning less than four feet in length,) and claimed that allowance should be made for that. To this Hitchcock, the plaintiff's agent, replied that they came there to ascertain the running measure of the piles only, and Wade answered "then very well, we will go on," that if that was what the witness wanted, it was all right. They measured the length of the piles and the height of some, and estimated the height of the rest. Some deductions were made for deficiency in height. In this way the plaintiff's agent made the wood amount to 2,439 cords. The defendant showed by Daniel Goodwin, track master, and deputy superintendent Wade, that the contract for the wood was reduced to writing and presented to Kellogg to be executed. That Kellogg read it — said it was all right — just as they had talked, only he did not wish his name to appear in it; and he told Goodwin to have it in Kennedy's name alone, and he would sign it. It was never signed. This contract was offered in evidence, and rejected.

Goodwin and Wade both testify that there was no agreement to purchase from the plaintiff more than 2,000 cords of wood; that the wood was to be four feet in length; and whenever five hundred cords were delivered and measured, that quantity was to be paid for within twenty days.

The defendant offered to show that notice was given by the defendant to the plaintiff on the 26th day of April, 1865, that it would employ an experienced wood measurer named Sawyer, of Syracuse, to measure the wood and ascertain the actual quantity delivered by the plaintiff; that the plaintiff made no reply thereto; that such measurement was made by said Sawyer before any of the wood was sawed or used by the defendant, and the amount of wood made by said Sawyer on such measurement. Objection was made by the plaintiff, the court sustained the objection, excluded the evidence,

Kennedy v. Oswego and Syracuse R. R. Co.

and the defendant's counsel excepted. Several other offers of evidence were made. To each and every of which the plaintiff's counsel stated, as grounds of objection, that the defendant having, by its agent, removed the wood as it was being delivered, and directed in regard to it, and having examined the wood as it was delivered, and the wood being open to its inspection, and no objection having been made by it as to its quality, either at the time of its delivery or within the twenty days within which it was to be inspected, measured and paid for, and having on the 24th of April measured the wood with plaintiff, and thereafter used it without any further measurement or delivery from the plaintiff to it, had accepted the wood and waived any defects as to its quality.

It was conceded by the plaintiff that he had received from the defendant \$8,000 on account of the wood in question.

The testimony being closed, the court directed the jury to find a verdict for the plaintiff for \$1,945.32, to which the defendant's counsel duly excepted.

The jury found a verdict accordingly.

A. Perry, for the defendant. I. The court erred in excluding the evidence offered by the defendant to show the length of the wood and the number of cords delivered by plaintiff to defendant, at the rate of 128 cubic feet to the cord. 1. This evidence was proper to show the number of cords for which the defendant was liable to pay. All agree that the wood was to be paid for at the rate of four dollars per cord. The evidence was not offered to show non-performance of the contract by the plaintiff, nor to lay the foundation for recoupment of damages by reason of the defective *quality* of the wood. The principle declared in *Reed v. Randall* (29 *N. Y. Rep.*, 358) and cases there cited, has no application here. The term "cord," as used by the parties in making this

Kennedy v. Oswego and Syracuse R. R. Co.

agreement, signified 128 cubic feet. (*Worcester's Dic. Webster's Dic. New American Cyclopædia*, vol. 16, pp. 328, 335, tit. "Weights and Measures.") *Many v. Beekman Iron Co.*, 9 Paige, 188, 195.) 2. By accepting the wood, the defendant may have waived any defect in quality, but this certainly did not preclude inquiry as to the quantity. 3. There was no agreement by Wade that 2,091 cords of wood should be accepted and paid for as 2,438 cords. He constantly objected to the shortness of the wood, and claimed deduction from quantity on account of it. Wade had no authority to make such agreement. Such agreement would be void for want of consideration. 4. This evidence was proper to show why no objection was made to receiving more than 2,000 cords. It could not be known that there was more than 2,000 cords until after a correct measurement.

II. The court erred in excluding the unexecuted memorandum of agreement for the purchase and sale of the wood. Every species of memorandum is now admissible as evidence. (*Guy v. Mead*, 22 N. Y. Rep., 463.)

III. The court erred in excluding evidence of the measurement of the wood by Sawyer, and notice thereof to the plaintiff. This was notice to the plaintiff that the defendant repudiated the measurement made on 24th of April, and was given before any of the wood was sawed or used.

IV. The direction by the court to the jury to find a verdict for the plaintiff for \$1,945.32 was erroneous.

J. H. Townsend, for the plaintiff. I. The quality of the wood, for soundness and length, was open to the inspection of the defendant, and was examined by it during its delivery, and no objection having been made thereto, during the time of its delivery, or within the time that the payment therefor was to have been made, which was a reasonable time within which the defen-

dant might examine the wood, and the measurement thereof having been made also without objection in that regard, all constitute an acceptance of the wood. The defendant might reject the wood, if not according to the contract, but not having done so, it cannot now be allowed to say that it was of inferior quality. (*Spragus v. Blake*, 20 *Wend.*, 61.) The principle is very clearly stated in the case of *Ely v. O'Leary* (2 *E. D. Smith*, 355), in the following language: The purchaser "was bound to accept them as performance of the executory contract, or reject them as soon as he discovered the alleged inferiority, and give notice of such rejection, and not having done the latter he must be deemed to have acquiesced in the quality." (See also *Warren v. Van Pelt*, 4 *E. D. Smith*, 202.) The case of *Reed v. Randall*, (29 *N. Y.*, 358,) would seem to be conclusive upon this point.

The defendant cannot say that the length of the wood did not appertain to its quality, for the agreement which it claims to have made, expressly so recognizes it. The defendant's superintendent, in stating the agreement, says the question was asked him, "What length he required it to be cut? I told him it must be four feet long."

II. In no otherwise than by and through the measurement and delivery made on the 24th of April, has the defendant any title to the wood. It was either a trespasser in taking the wood, or it derived title thereto under that measurement; for there is no suggestion, even, that the plaintiff ever assented to any remeasurement, or made any other delivery of the wood to the defendant. The defendant cannot claim itself to have been a trespasser. Hence, having taken the wood under the measurement, it is bound by it. It does not claim that it found any error in the measurement. Had it found such error, it should have declined to receive the wood until the correction should be made, and certainly if

Kennedy v. Oswego and Syracuse R. R. Co.

after the measurement it claimed a different rule, the claim was abandoned when it commenced using the wood.

III. The acceptance of the 2,436 cords, implies a promise to pay the purchase price of the 436 cords in excess of the 2,000 cords first contracted for.

IV. The unexecuted contract offered in evidence was properly rejected. 1. The paper was not perfected as an agreement. (*Mumford v. Whitney*, 15 *Wend.*, 380. *Robinson v. Cushman*, 2 *Den.*, 149.) 2. It does not purport to be an agreement between the parties. It purports to be between plaintiff and one Kellogg of the one part and one Hiram Wade, described as agent, &c., of the other part. 3. The paper was offered *as a contract*, and was objected to *as unexecuted*, as the case plainly shows. It was not offered as a part of the admission claimed to have been made by plaintiffs to defendant's agent. 4. As an admission it was worthless, for the reason that it being conceded that the plaintiff's agent declined to execute it, and the reasons of such declining being in dispute, the contents of the paper throw no light upon the admission, and especially so as the evidence is conclusive that the reason why the execution was declined was because the paper did not correctly state the agreement. At the best it was but a mere memorandum, and as such was not evidence *per se*. (2 *Phillips Es.*, 412.) 5. But even if the paper were competent, the case would not be materially changed. We concede that the case must stand upon the facts, governed by the contract as stated by witness Wade, the deputy superintendent of the defendant's road, and it would stand with like stability governed by the agreement as stated in the writing.

By the Court, MULLIN, J. When a contract is made for the purchase and sale of a given number of cords of wood, the vendor is bound to deliver, and the vendee is

entitled to receive, 128 cubic feet for each cord of wood so contracted for. Usage has prescribed the number of feet each cord shall contain; and in the absence of an agreement or of a custom that a less number of feet shall constitute a cord, the usage applies to and controls the agreement.

No different custom is suggested in this case; and hence the inquiry is confined to whether there was a contract between the parties by which the defendant was bound to accept less than 128 cubic feet for a cord; or whether the wood delivered was accepted in performance of the contract.

It appears by the evidence of the plaintiff's witnesses that one of the defendant's agents went into the woods while the wood in question was being cut, and saw it, and it was said in his presence that a few cords of it were too short; that while the wood was being delivered, there was no complaint that it was too short, but complaint was made on that subject when it was being measured. The defendant's agent designated the place where the wood should be piled, and he gave directions as to the size of the piles. The height of the piles was objected to, at the time of the measurement, and a deduction was made, for the deficiency in height. Wade, one of the defendant's agents, attended to the measurement, and stated to the plaintiff's agents that the quantity was 2,438 cords, and did not make any complaint as to the result, nor intimate that he wished any further measurement. After the measurement was completed, Wade claimed there should be a deduction of ten cords, and it was made. The plaintiff's book-keeper testifies that he attended the measurement, and that Wade complained that the wood was too short, and that an allowance should be made for it. The witness told him they came there to ascertain the running measurement of the piles, only, and Wade replied, "Very well, go on; if that was what I (the witness)

Kennedy v. Syracuse and Oswego R. R. Co.

wanted, it was all right." It was also proved that a part of the wood was sawed by the defendant's hands, and a part of that thus sawed was used by the defendant.

Laying out of view, for the present, the evidence of an express agreement to take the wood as it was cut, as if it were four feet long, let us ascertain whether the facts above stated establish an agreement to accept the wood as if it were four feet long, or whether there was an acceptance of it in full performance of the contract, so as to preclude the defendant from now insisting that it was not as long as the contract called for.

When a contract is made for the purchase of a given number of cords of wood, which the purchaser is informed is but three feet long, he is not bound to accept of a pile of such wood eight feet long and four feet high, as a cord. He is entitled to 128 cubic feet. Such a pile gives him only ninety-six. Usage has defined the meaning of the word "cord;" and the contract must be construed in reference to it. And that meaning cannot be changed, unless the parties mutually so agree, or the contract was made in reference to some other well known custom or usage which recognizes a quantity less than 128 cubic feet as a cord. The known length of the wood is the only circumstance, aside from the alleged express agreement, that can be relied upon in support of an implied agreement to take the wood upon the contract as if it were four feet; as that was the only fact then known to the parties. All the other matters testified to by the witness occurred subsequent to the making of the contract. That fact, alone, is not enough to establish such a contract.

If the contract is to be deemed as not made until the wood was actually delivered, not having been reduced to writing, all the facts proved were, of course, then known to both parties, and they are all to be considered in determining whether there was a contract to purchase the wood as if it were the proper length. Even

Kennedy v. Oswego and Syracuse R. R. Co.

then, they do not conclusively establish such a contract. The facts are all of them competent to go to a jury, and from them it might infer such an agreement; but a finding against such a contract could not be set aside as against the evidence.

The next question is, do the facts proved show an acceptance of the wood delivered as a full performance of the agreement?

The respondent's counsel insist that they do; and if the defendant's agents did not intend to accept the wood as being a compliance with the terms of the contract, it was their duty to refuse to receive it, and to return what they had taken.

Had the plaintiff informed the agents of the defendant that the wood, if received by them, must be taken as if it were four feet long, and it had been then accepted, the acceptance would have been conclusive on the defendant. But no such condition was imposed, or notice given. If wood three feet long answered the purposes of the defendant as well as if it were four feet, it had no occasion to find fault with the deficiency in length, as it might be made up in the final calculation of the quantity. Or, if the wood delivered had been six feet long, it could not be claimed that it was to be estimated at four feet only. In each case the purchaser would be entitled to 128 cubic feet, and no more; and he certainly should not be obliged to take less.

The same principle is not to be applied to a contract for firewood or timber, purchased for some specific purpose, which requires it to be of a certain length. In that case, if wood of a length different from that contracted for is delivered and received, the contract is satisfied. But when the contract is for wood for being burned, and the contract does not define the length, it may be longer or shorter than four feet; but the vendor must deliver 128 cubic feet for a cord.

In the absence of any notice that an acceptance of the

Kennedy v. Oswego and Syracuse R. R. Co.

wood would be considered as an acceptance of it as if it were four feet long, the acceptance and use would not estop the defendant from insisting upon a full cord. Indeed the remarks of the book-keeper were calculated to induce the defendant's agents to believe that the plaintiff would not insist that the wood should be considered, in arriving at the quantity delivered, as if it were four feet long.

I do not think the facts proved show such an acceptance as estops the defendant from alleging that the contract was not fulfilled. It was for the jury to say whether the plaintiff proved an acceptance in full performance of the contract.

I come now to the express agreement sworn to by the witness Kellogg. He says that a day or two after the conversation between him and Goodwin, about selling the wood, he (witness) told Goodwin that, to avoid any trouble about measuring it, if he would take it at its length he (the witness) would take \$4 per cord for it. And it appears that the price agreed on was the sum thus indicated. It does not appear that Goodwin made any response to this proposition. But it would be fair to presume, in the absence of evidence to the contrary, that \$4 was accepted by the plaintiff's agent instead of \$4.50 asked, in consideration of the shortness of the wood. If this was the contract, there would be no ground for a claim for reducing the quantity because the wood was too short; and the judge might with great propriety have directed a verdict. But Goodwin denies that he ever assented to receive less than 128 cubic feet to the cord; and it was for the jury to say which of the witnesses was worthy of credit. Although Goodwin does not contradict the plaintiff's witness, as to what was said about taking it at the length it was cut, at \$4 per cord, he does not deny the inference which would be drawn from it; which was that less than 128 cubic feet would be accepted as a cord.

Kennedy v. Oswego and Syracuse R. R. Co.

In every aspect of the case, the questions of fact were for the jury, and should have been submitted to them.

The defendant's counsel excepted to the direction to the jury, but did not ask that any questions should be submitted to it; and the question is, whether such request was necessary, in order to enable him to get the benefit of the error in the direction to find for the plaintiff.

I think it was. In *Bidwell v. Lament*, (17 How. Pr. 357,) it was held that when a judge grants a nonsuit, in a case where there is conflicting evidence, and no request is made, to submit the questions of fact to the jury, he cannot derive any benefit from the error. And an exception to the granting of the nonsuit is not equivalent to a request to submit the facts to the jury. It can make no difference, in principle, whether the court directed a nonsuit or ordered a verdict. In either case, it is the duty of the court to submit conflicting evidence to the jury, if requested so to do. But in the absence of a request, the court may itself pass upon the facts, and the parties will be deemed to have acquiesced in the action of the court.

The appellant's counsel relies upon the exclusion of evidence offered by him to show the length of the wood and the number of cords delivered, at the rate of 128 cubic feet per cord, to reverse the judgment.

This evidence was utterly immaterial. There was no dispute but that, if the defendant was entitled to 128 cubic feet to a cord, 2,438 cords, for which the plaintiff claimed to be paid, had not been delivered. The plaintiff's whole case proceeds upon the theory that the defendant had expressly or impliedly agreed to receive, for a cord, less than 128 feet, or accepted a less quantity in satisfaction of the greater. The court must have found one or the other of these propositions; and proof that there was not of the wood 2,438 cords of 128 cubic

Kennedy v. Oswego and Syracuse R. R. Co.

feet each, could not affect the finding. That was a conceded fact, in the case.

The defendant's counsel suggests that the defendant's agent had no power to agree to accept 2,091 cords of wood in satisfaction of a contract calling for 2,438. If we knew that the court found the facts to be as alleged, the conclusion of the counsel would follow. But, upon the evidence, the court had the right to find that the defendant agreed to take the wood as if four feet in length, provided the plaintiff would take \$4 per cord therefor; and thus finding, the defendant was bound by the act of the agent, and there was a sufficient consideration for the agreement.

The defendant proved by the witnesses that one of the defendant's agents drew a writing setting out the terms of the agreement in relation to the wood; that he presented it to the plaintiff's agent who made the contract, who said it was correct, but he wished the plaintiff's name in it, instead of his own. It was never signed by either party. The defendant offered this writing in evidence, and it was excluded.

This paper is called by the counsel a memorandum, and he insists that it was competent evidence to show what were the terms of the contract between the parties; and he cites *Guy v. Mead*, (22 N. Y., 463.) The paper offered in this case was made by the defendant's agent, and not by the plaintiff or his agent. In the case cited, it was made by the witness, and it was admitted because the witness swore that it was made at or about the time the transaction occurred, and that it was correct when made. He had forgotten the facts, and could only state them as, and because, they appeared in the paper. It was just as well to admit the paper as to allow the witness to read it. This paper, not being signed, was not evidence of the contract. It was made by the defendant's agents, and was to them evidence that the con-

Kelly v. Fall Brook Coal Company.

tract was as they testified to it. But a memorandum is not received to corroborate a witness who recollects the facts, independent of it, but to recall the facts if he has forgotten them. When the witness may resort to it to refresh his recollection, it may be read in evidence. But unless it becomes necessary for this purpose, it is wholly incompetent. As well might a witness attempt to corroborate his evidence by calling a witness to testify that soon after a contract was made he, the witness, told him its terms as he swears to them on the trial. Such evidence would clearly not be competent. As to when a memorandum is competent, see *Marclay v. Shults*, (29 N. Y., 346.)

For these reasons I think the judgment should be affirmed.

New trial denied.

[ONONDAGA GENERAL TERM, April 2, 1867. *Morgan, Bacon, Foster and Mullin*, Justices.]

KELLY vs. FALL BROOK COAL COMPANY.

One dealing with an agent is not bound to know the private instructions to the latter. If the agent is in fact accustomed to make contracts of that nature for his principal, and this is known to the latter, that is sufficient to render the principal liable upon the agent's contracts.

In June, 1873, a contract was made between the parties by which the plaintiff agreed to carry coal for the defendant, from Watkins to some point east, that season, at regular prices, and the defendant agreed to load the plaintiff's boat in regular turn with its own. On the 14th of August, after carrying two loads of coal, the plaintiff came to W. with his boat, for another load, his turn coming on the 16th. He was obliged to wait for a load until September 3d. *Held*, that the defendant, in failing to load the plaintiff's boat in its turn, broke its contract; and the plaintiff was entitled to damages, for such breach.

Held, also, that the plaintiff, being under a contract with the defendant for the season, was entitled to notice that the defendant would not perform the agreement, on its part; and that, in the absence of any such notice, the plain-

Kelly v. Fall Brook Coal Company.

tiff was justified in waiting for a load, and should be allowed, as damages the profits of one trip, which it was shown he could have made during the period of detention. That what he could have earned under the contract, during that time, was the proper measure of his damages.

Held, further, that the defendant had no right to claim that in measuring the damages, the referee should have considered, by way of reduction, the profits made by the plaintiff during the rest of the season, after the September trip. Also *held*, that the plaintiff was entitled to *interest* upon the amount of damages recovered.

APPEAL, by the defendant, from a judgment entered upon the report of a referee.

The action was brought to recover damages for a breach of contract. The complaint alleged that about the 7th of June, 1873, the parties entered into an agreement by which the plaintiff agreed to carry coal for the defendant, that season, at regular prices, and the defendant agreed to load the plaintiff's boat and furnish a cargo from the defendant's office at Watkins, in the county of Schuyler, to some point east, in turn with the defendant's boats, and in that way give full cargoes and employment for the plaintiff's boat and its master and crew, during the said season. The breach alleged was, that the plaintiff's boat was not loaded in its turn, by the defendant, but was kept idle, and damages sustained thereby.

Hurd & Fletcher, for the appellant.

Wm. Lounsbery, for the respondent.

By the Court, LEARNED, J. The first objection is that the defendants are not proved to be a corporation. But they have attained the privilege of suing and being sued as a corporation of this state. (*Laws 1864, ch. 192; of 1873, ch. 139.*) And in the present action they are enjoying that privilege. I do not see any cause of complaint in this respect, on their part.

The next objection is as to the authority of Mr.

Kelly v. Fall Brook Coal Company.

Thomas. The president of the company testifies that Thomas had charge of receiving coal and distributing boats; that Thomas made the contracts for the company that were made personally; and that the president did not contract personally.

Now, although the president further says that Thomas had no authority to contract for boats, and had instructions not to contract without Mr. Magee's knowledge, yet the plaintiff was not bound to know the private instructions to Thomas. The very language, "instructions not to contract for boats without my (Mr. Magee's) knowledge," implies that with Mr. Magee's knowledge Thomas was to contract. And the plaintiff could not know whether Mr. Magee had or had not directed Thomas to contract with him. If Thomas was, in fact, accustomed to make the contracts, and this was known to the company, that is sufficient.

The next question is, whether there was a contract made.

This is a question of fact, and the judgment of the referee on the conflicting testimony ought to control. He saw and heard the witnesses.

Several questions as to the value of the use of the plaintiff's boat were objected to. The answers were material only on the question of damages. And the rule on that point adopted by the referee did not depend on these answers. They were immaterial, and did not affect the result.

The contract found by the referee to have been made is, that the plaintiff should carry coal for the defendants that season, at regular prices, and that they should load his boat in regular turn with their own. After he had carried two loads for them he was again at their place, on the 14th of August. His turn came the 16th. He was not loaded till September 3d. When loaded, he testifies that he told Mr. Thomas that he did not think there was much use of his coming back, and that

Kelly v. Fall Brook Coal Company.

Thomas said that he did not know that he would load him again that fall. Thomas denies this. After the plaintiff had carried the load of September 3d he did not return to Watkins.

The referee has given him damages for the detention from August 16th to September 3d.

Assuming, then, that there was such a contract, as is found by the referee, it seems to be plain that the defendants broke it by failing to load the plaintiff in his turn. And he would, therefore, be entitled to damages. But the defendants insist that the plaintiff was wilfully idle, and did not seek other employment. It does not, however, appear by the evidence that the defendants distinctly and plainly gave the plaintiff to understand on the 16th of August that they would not perform their contract.

According to the plaintiff's testimony, he had some conversations with Thomas at different times in the interval between August 16th and September 3d, in regard to his being loaded. And from these conversations the plaintiff might have understood that he was not discharged from their employment. And assuming that he was under a contract with them for the season, he was entitled to be distinctly notified, by words or acts, that the contract was broken. The referee finds that the plaintiff was "kept waiting;" and there is evidence to support that finding.

The rule of damages which the referee adopted was to allow the plaintiff the profits of one trip; which it was known he could have made during this detention. During that time the plaintiff was waiting, in order to carry out the contract which he had made. And what he could have earned under the contract during that time seems to be a correct measure of his damages.

After the trip which began September 3d, both parties abandoned the contract. The plaintiff did not return, and he says that he notified the defendant that he should

Kelly v. Fall Brook Coal Company.

not. And the defendants insisted that there was no contract. But the defendants claim that, in measuring the damages, the referee should have considered, by way of reduction, the profits made by the plaintiff during the rest of the season, after the September trip.

That does not seem to be just, and does not follow from the decisions on this subject. The plaintiff does not recover for the amount which he might have earned under his contract after September 3d.

He recovers only for the time when, by waiting in order to fulfil this contract, he was prevented from earning anything. The defendants ought not to have the advantage of his subsequent industry. For that same industry, if exercised during the nineteen days of delay, might have produced for the plaintiff still more profits.

It was proper to allow interest. (*Van Rensselaer v. Jewett*, 2 N. Y., 135.)

The judgment should be affirmed. (a)

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM at Albany, January 5, 1875.
Learned, Boardman and James, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hun.* 261.

HADEN and another vs. BUDDENSICK and others.

To create a consideration sufficient to support an obligation for the security or payment of money, nothing further is required by either law or equity than benefit to the party obligated, or harm to the person designed to receive it. S. having agreed to furnish B. with materials and labor for erecting buildings upon lots owned by B., the plaintiffs sold to S. sashes, doors and blinds for such buildings, of the value of \$8,000, for which sum he filed a lien upon the buildings and lots. For the purpose of removing such lien from his property, B. executed a bond and mortgage to S., to secure the payment of \$8,000 and interest; whereupon the plaintiffs discharged the lien, and the bond and mortgage were assigned to them. When the bond and mortgage were given, there was, by the terms of the contract, nothing due to S. from B. In an action to foreclose the mortgage; *held*, that want of consideration could not be set up as a defence. That it was beneficial to the mortgagor and owner of the property to have the lien upon it discharged; and that after receiving the stipulated benefit, and giving the bond and mortgage for it, he could not be exonerated from the obligation to pay what he expressly covenanted for as its price.

Held, also, that if S., the contractor, failed to perform his agreement, the remedy against him was confined to an equivalent by way of damages, not by resisting the enforcement of the security.

A PPEAL by the defendants from a judgment entered on a referee's report. (*S. C.*, reported briefly, 4 *Hun*, 649.)

Benjamin M. Stillwell, for appellants.

Osborn E. Bright, for respondents.

By the Court, DANIELS, J. The object of this action was the foreclosure of a mortgage executed by the defendants, Charles A. Buddensick and wife, to Gustav A. Sturtzkober, to secure the payment of \$8,000 and interest, and assigned by him to the plaintiffs and Samuel Wilson, who afterwards assigned his interest to the plaintiff. Before the execution of the mortgage the mortgagee, Sturtzkober, had entered into contracts with the defendant Charles A. Buddensick, for supplying materials, and the performance of labor, in erecting and furnishing certain buildings on premises situated in the

Haden v. Buddensick.

city of New York. The plaintiffs, and Wilson, then their partner, had furnished and supplied to Sturtzkober, the contractor, sashes, blinds and doors for such buildings, at his request, for which he had become indebted to them in the sum of \$8,000, and they had filed a lien for the debt on the buildings and the land they stood upon. By the terms of the contracts nothing appears to have been due to the contractor when the mortgage was given. And whether anything more would afterwards become due to him under their terms depended upon the completion of the work which he had agreed to do. Upon that being done, a much larger amount than that mentioned in the mortgage would become due from the mortgagor to the mortgagee. The former, for some reason, desired to remove the lien from his property, which had been placed upon it by the plaintiffs and Wilson, and for that purpose agreed to give the mortgage and the bond secured by it to the contractor, with the understanding that it should be assigned to them upon their discharging their lien. In conformity to that agreement the bond and mortgage were executed, delivered and assigned, and the plaintiffs and Wilson discharged and satisfied their lien. The defendant Buddensick's wife claimed, upon the trial, and insisted upon the argument of the appeal, that as long as nothing was actually payable by the terms of the contracts when the bond and mortgage were given, they were without consideration, and could not be enforced, for the reason that the contractor had since failed to complete his work.

The mortgagor undoubtedly believed and expected that the contractor, to whom the bond and mortgage were given, would afterwards perform the agreements he had made, and in that manner entitle himself, or his assignees, to the moneys mentioned in and secured by them. But the fulfilment of that expectation was not, under the circumstances, essential to their validity. For they were in no manner made payable by their terms on

Haden v. Buddensick.

that condition; neither was any agreement made that they should become inoperative in case of a failure to perform on the part of the contractor. The bond and mortgage were executed on the 22d day of December, 1871, on the unqualified condition that they should become void on the payment by the defendant Charles A. Buddensick, of the sum of eight thousand dollars with interest on the 22d day of June, 1872. And when they were received by Sturtzkober, the contractor, he executed and delivered to Buddensick a receipt, stating that they were delivered on account of the various sums of money coming to him on his contracts for doing and performing the carpenter work on certain buildings situated in the city of New York and the amount secured by said bond and mortgage, viz., said \$8,000; "and interest thereon for six months in advance, is hereby certified to have been paid to me on said contracts, and credit therefor is hereby given by me to said Buddensick thereon." From the terms of this receipt it is evident that the bond and mortgage were given and accepted in the nature of an advanced payment of what was expected to become due to the contractor under the terms of his contracts. Buddensick, the owner of the property, held the obligations of the contractor, agreeing to perform the work, which would entitle him to the payment provided for; and it was expected that such performance would afterwards be made. The defendant Buddensick trusted and confided in the agreements contained in the contracts, and relied upon their completion for his protection in making the payment secured by the mortgage. And in that expectation gave the bond and mortgage to procure the discharge of the lien then appearing on file against his property. He regarded it as desirable, and beneficial to him to have the lien discharged. And if its satisfaction was a sufficient consideration for their support, they remain legally binding,

although the expectation of performance on the part of the contractor afterwards failed.

To create a consideration sufficient to support an obligation for the security or payment of money, nothing farther is required, by either law or equity, than benefit to the party obligated, or harm to the person designed to receive it. This principle is well settled, and a compliance with its requirement will sustain the most important undertakings. (1 *Parsons on Cont.*, 2d ed., 357. *Freeman v. Freeman*, 43 N. Y., 34-39.) It undoubtedly was beneficial to Buddensick, the mortgagor and owner of the property, to have the lien appearing against it discharged. He regarded it in that way; otherwise he would not have undertaken to give the bond and mortgage he was in no way bound to execute, or deliver, for the purpose of securing its satisfaction. And after receiving the stipulated benefit, and giving the bond and mortgage for it, he cannot be exonerated from the obligation to pay what he expressly covenanted for as its price. The proof shows that the burthen was imposed for that advantage and for that alone, and as he secured it the law will not now allow him to avoid its consequences. If the contractor has failed to perform his agreements, the remedy against him is confined to an equivalent by way of damages, not by resisting the enforcement of the security not rendered dependent on his future fulfilment.

The defence was not alleged, but evidence was given tending to show a subsequent renewal of the lien. How that could have been valid after it had once been discharged, and the bond and mortgage had taken its place, was not made to appear during the trial. It could not very well have become so, under the circumstances appearing in the case. For that reason it was no defence to the foreclosure, and the referee did right in rejecting it. The bond and mortgage were made payable, in absolute terms, on the day mentioned in them, and the

Speyer v. Colgate.

obligation could not be changed by evidence showing that a different agreement would have been more judicious, as long as the contracts made were then unperformed. The terms used seem to have been in strict accordance with the understanding entered into. The obligation was assumed without deception or mistake, just as it was designed to be created ; and as it was supported by a sufficient consideration, it cannot be successfully resisted because the contractor afterwards failed to perform the terms of his agreements.

The judgment recovered was right, and it should be affirmed with costs.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

SPEYER vs. COLGATE and others.

Where there is no stipulation for credit or delay, on either side, in contracts for the sale of property, a delivery of it, and the payment of the price, are each conditions of the other, and neither party can sue for a breach without having offered performance on his own part. A mere readiness to perform is not sufficient.

The plaintiff being, in January, 1865, the owner of \$40,000 in gold, which had been purchased for him by the defendants, as his brokers, entered into two agreements with M. for the sale thereof to him ; by one of which he agreed to deliver to M. \$20,000, at M.'s Option, between the 1st and 20th of February, and by the other he agreed to deliver to him \$20,000, at any time when called for, between the 21st day of January and the 20th of February. The gold was to be delivered, and the price paid, in New York. These contracts, signed by M., were sent by the plaintiff to the defendants, with directions to deliver to M. the amounts of gold contracted for. On the 30th of January, an agent of M. demanded of the defendants, and received from them, the \$20,000 first deliverable. The \$20,000 sold under the other agreement was not tendered by the defendants during the time specified in that agreement. *Held*, that it was the duty of the defendants to make such tender ; and that the plaintiff having, by their neglect to do so, lost the benefit and advantage

Speyer v. Colgate.

of the sale, and the right to enforce the contract, he was entitled to recover of the defendants the damages he had sustained.

Held, also, that the plaintiff, on discovering that the defendants had failed to deliver or tender the gold, should have taken prompt measures to protect himself from further loss, by directing a sale of the gold on hand; and that he having omitted to do so, the defendants were not liable for any loss occasioned by a subsequent fall in the price of gold.

A party subjected to loss by the misconduct of another has no right to unnecessarily enhance it for the purpose of aggravating the injury caused by the wrong. Good faith requires him to protect himself from needless loss, so far as that can be accomplished by reasonable efforts and attention. *Per DANIELS, J.*

A PPEAL by the defendants from a judgment recovered on the report of a referee. (*S. C.*, reported briefly, 4 *Hun*, 622.)

C. N. Tower, for the appellants.

James P. Lowrey, for the respondent.

By the Court, DANIELS, J. The defendants were the plaintiff's brokers and agents in the city of New York, with whom he kept his financial accounts, and through whom he bought and sold gold and provided for payment of his drafts. Under his authority and direction they purchased for him in the month of January, 1865, \$40,000 in gold. And the plaintiff entered into two agreements with B. Meyberg for the sale of the same gold. By one he agreed to deliver to Meyberg, who also contracted to receive it from him, \$20,000 in American gold, at two dollars and five cents, not before the 1st of February, but after that up to the twentieth. And the amounts were payable and receivable in the city of New York. And by the other the same amount of gold was contracted to be sold, at the same rate or price, to be delivered at any time when called for during thirty days from the 21st day of January, 1865, the time expiring on the 20th of the following month. And by its

Speyer v. Colgate.

terms the price was payable, and the gold to be delivered, in New York.

The plaintiff sent these contracts, signed by Meyberg, to the defendants from Cincinnati, where he resided, in a letter dated the 23d of January, 1865.

He advised them, by letter, that he had sold the gold purchased for him, to Meyberg, 20,000 at his own option from the 1st to the 20th of February, and 20,000 at Meyberg's option for thirty days from the 21st of January, at the price of 205 per cent. each, and requested them to deliver the amounts to the buyer as contracted, and charge the plaintiff with their usual rate of interest during the time they carried the amount for him. On the 30th of January, 1865, the defendants answered this letter as follows:

"We have received your favor 23d inst., with inclosures as stated, and we note your instructions in regard to contracts with Mr. Meyberg."

Meyberg delivered the agreement received by him from the plaintiff to Drake Brothers, who were brokers in Broad street, and they called upon the defendants for the gold agreed to be delivered by the contract dated the 21st of January, on the option of the purchaser. That was done on the 30th of that month, and the gold was delivered according to the terms of the contract. At that time William F. Drake, who presented the contract to the defendants, and received the gold upon it from them, informed Mr. Hoffman, of the defendants' firm, that there was another contract quite similar, for the same amount, and asked if he would deliver the gold on that. The reply was that he did not know; that it would be time enough to attend to that when he had instructions. He stated, further, that Mr. Hoffman looked over the paper and said, "Who is this Meyberg?" "I told him he was a merchant and customer of ours, and he had left these contracts with us to attend to for him. I stated that Mr. Meyberg left with us two contracts be-

Speyer v. Colgate.

tween himself and Mr. Speyer, each for \$20,000 of gold ; one was deliverable at Mr. Speyer's option, and the other at the option of Mr. Meyberg. I received the gold on the contract on Mr. Meyberg's option." The witness also testified that he was ready to receive the gold on the other contract ; that he and his house were ready to receive it all the time the contract was open, and a week or ten days afterwards ; but it never had been tendered to him. And it was not pretended by the defendants that they had ever tendered or offered the gold deliverable at the plaintiff's option, to the witness or either member of his firm, or to any person acting for them, or to Meyberg in person, who resided in Cincinnati, but was engaged in business as a dealer in hats in the city of New York.

By the contract remaining unperformed, the plaintiff, had the option to deliver the gold at any time between the 1st and 20th of February. It was clear and positive on that subject. But before he could entitle himself to the price to be paid for it, a tender or offer of it on his part was requisite. The rule upon that subject is, that where there is no stipulation for credit or delay on either side, in contracts for the sale of property, a delivery of it, and the payment of the price, are each conditions of the other, and neither party can sue for a breach without having offered performance on his own part. (*Per Denio, J., in Tipton v. Feitner*, 20 N. Y., 423, 425.) A mere readiness to perform is not sufficient for that purpose. (*Johnson v. Wygant*, 11 Wend., 48. *Williams v. Healey*, 3 Denio, 363, 367. *Nelson v. Plimpton Elevating Co.*, 55 N. Y., 480. And as no tender or offer of the gold was made on the plaintiff's behalf, he lost the benefit and advantage of the contract by means of that default. And if that was occasioned by the neglect of the defendants, they were rightly charged with the loss arising out of it, by the judgment which the plaintiff recovered.

Speyer v. Colgate.

The contract by which Meyberg bound himself to receive and pay for the gold, was indorsed by the plaintiff to the defendants, and sent to them in the letter of the 23d of January, already mentioned. They must, therefore, from that circumstance, as well as their reply sent to him, be deemed to have acquainted themselves with what it was necessary should be done in order to perform it on the part of the plaintiff; and to secure him its advantages, it was placed in their hands for the purpose of having them perform it for him, and they had the necessary amount of gold belonging to him for that object, and had notice from Meyberg's brokers, that the contract was in their hands to be attended to for him. Under these circumstances, the duty was clearly imposed upon the defendants to make the tender or offer necessary to secure the plaintiff the full benefit of the contract he had made for the sale of the gold they held for him. And by their letter advising him that they had noted his instructions in regard to the contracts, they in effect undertook to comply with his request that they would deliver the gold to the buyer as contracted. That was the clear effect of the two letters, under the circumstances. It was an agreement to do for him what should be required to constitute performance on his part. And the contract gave them ample time to do that. The obligation was clear and explicit, arising out of terms used which were free from all uncertainty. And for that reason they could not be relieved from performing it by the force of any usage or custom observed in their business. (*Wadsworth v. Allcott*, 2 *Seld.*, 64. *Wheeler v. Newbould*, 16 *N. Y.*, 392, 402. *Bradley v. Wheeler*, 44 *id.*, 496.)

It was claimed in their behalf that they were relieved from the obligation of tendering or offering the gold to Meyberg or his brokers, by the terms of a letter written them by the plaintiff on the 27th day of January, 1865. This letter stated that the plaintiff had advised Meyberg

Speyer v. Colgate.

to call on them for the \$40,000 gold, "for which he is to pay the rate of 205, as per his contract sent to you with my letter of the 23d." There was nothing in it exonerating them from the performance of their duty, as that had been previously fixed, if he did not conform to the advice by himself calling for the gold. It did not direct or intimate that they should neglect to offer a delivery of it, in case he omitted to avail himself of the advice. The fact that it had been given him did not modify nor change, in any respect, the contract which had been made, particularly as the letter contained no intimation that Meyberg had promised to call, himself, for the gold. If he had called for it, of course that would have been sufficient for the justification of the defendant's omission, in case they had made the necessary delivery of it, or had offered to do so on their part. But he did not do so, unless the interview between Mr. Drake and the defendant Hoffman was equivalent to a call for this gold. That it could not very well be, because it occurred before the plaintiff was under any obligation to make the delivery. But if it could be considered a call for the gold, the defendants would not be relieved from liability by anything which then transpired. For they declined to comply with it, the defendant Hoffman stating, by way of reply, that it would be time enough to attend to that when he had received instructions. He was then notified that the contracts were left with the Drake firm to attend to for Meyberg, and this portion of the business remained in that condition. Before that, the defendants had been requested by the plaintiff to deliver the gold for him on both contracts, and they had undertaken to do it. And after the letter containing the statement that the plaintiff had advised Meyberg to call on them for the gold, they were informed that he placed his contracts in the hands of brokers to attend to them for him. They declined to deliver this gold when requested to do so, before the time for performance had

Speyer v. Colgate.

arrived, and no suggestion was made that Meyberg's brokers would afterward call for it. The defendants were simply notified that the contract was in their hands to attend to it, and that only imported a disposition to give such attention to it as its terms required, which was to receive and pay for the gold when it should be offered by the defendants. There was nothing from which the defendants, as business men, could consistently draw any other conclusion. And if they were justified in delaying an offer of performance during any portion of the time, on the expectation that the gold, which was only to be delivered on the plaintiff's option, would be called for by Meyberg, that circumstance afforded them no excuse for allowing the entire period mentioned in the contract to pass without any tender of a delivery on their part. When the time for doing that was about expiring, it must have been entirely evident to them that Meyberg did not intend to call for the gold as the plaintiff had advised him to do. That advice subjected him to no obligation to do that. He still had the right to stand upon the terms of the agreement he had made, which did not require him to pay without an offer of the gold he was to pay for. And from what had transpired, the defendants had no reason to suppose his rights to be in any respect different from that.

It was also insisted that the defendants were not obligated to tender the gold, because they received no copy of the plaintiff's agreement to deliver it. That was entirely unnecessary, as long as they received Meyberg's contract to accept and pay for it. And they were not only requested by the plaintiff, but undertook to make the delivery in his behalf, and had his gold in their hands to enable them to do it. The plaintiff's loss, it is clear, was created by their failure to discharge the duty they had voluntarily undertaken — and that was to deliver the gold within the time mentioned in the contract subscribed by Meyberg. The plaintiff was to profit

Speyer v. Colgate.

by that performance, and it could make no difference to the defendants whether he had bound himself for it or not.

But if it could possibly be otherwise, there was enough in the correspondence to inform the defendants of the fact that he had given Meyberg a contract of similar import, on his part. For by his letter of 23d of January he stated that he had sold Meyberg twenty thousand of the gold at his own option from the first to the twentieth of February. And that corresponded exactly with the contract of Meyberg which was inclosed, by which he agreed to accept and pay for it in that way. There was nothing in the case which excused the defendants from performing the obligation they had entered into for the delivery of this gold. It was an inexcusable neglect—for the consequences of which the plaintiff had the right to resort to them for indemnity.

After their default, they transmitted to the plaintiff a statement of their account with him, and as he failed to object to that, the defendants claimed that the omission discharged them from liability for the non-performance of their duty. This position is without the least color of plausibility for its support; for the account did not state the fact that they had disobeyed his instructions and their own obligation. Before he could have approved of their misconduct it was necessary that he should have notice of it, and nothing of that kind was given by the account rendered. It would be a mockery of justice to hold that a cause of action could be extinguished in that manner after it had once been lawfully acquired. (*McKnight v. Dunlop*, 1 *Seld.*, 537-544.) There was no disposition on the part of the plaintiff to approve or acquiesce in the defendants' default. On the contrary, when it was discovered by him he at once intimated to them in very plain terms that he would expect them to satisfy him for the loss to which he had been subjected.

Speyer v. Colgate.

The proof showed that the price of gold rapidly depreciated after the defendants neglected to secure to the plaintiff the benefit of the agreement which Meyberg had entered into for its purchase. And so far as he was subjected to loss by this gold being retained in their hands after it should have been delivered to Drake Brothers for Meyberg, he was entitled to indemnity from them. But he was entitled to nothing beyond that. A party subjected to loss by the misconduct of another has no right to unnecessarily enhance it for the purpose of aggravating the injury caused by the wrong. Good faith requires him to protect himself from needless loss, so far as that can be accomplished by reasonable efforts and attention.

When the plaintiff discovered the failure of the defendants to deliver the gold to Meyberg, he had directed them not to sell that which was on hand, but to wait for advice. That discovery was made by the 3d of April, when he wrote his letter referring to their failure. The market was then falling, and continued to fall. After that, as he had directed the defendants not to sell, but to wait for advice, they held the gold remaining on hand under his orders, and consequently at his risk. He could have at once relieved himself from that risk by directing that the gold should be sold; but he did not do it, and the loss from that time resulted from this omission. Between the 3d of April, 1865, when the defendants' misconduct became known to the plaintiff, and the 11th of May, the time the gold was finally disposed of, according to the account rendered, its market value was very much reduced. That loss was included in the amount reported in the plaintiff's favor by the referee. No sound reason appears on which that portion of the amount allowed can be sustained. It was a loss occasioned by the plaintiff's own conduct in withholding the gold on hand from sale. Precisely what its amount

Speyer v. Colgate.

was, does not appear by the case, but as the book of gold exchanges was put in evidence for the year 1865, it can be accurately ascertained. The amount is claimed by the defendants to be \$2,499.42 besides interest. That calculation was made on the price of gold on the 31st of March. But it should not extend any further than the 4th of April, for that was probably the earliest day on which the gold could have been directed to be sold after the plaintiff discovered that the defendants had failed to conform to his instructions. The depreciation in the price on the \$12,898 of gold from that time to the 11th of May, with interest, should be deducted from the judgment.

The defendants' counsel claimed that a further deduction should also be made. But the propriety of making it does not seem to be supported by the evidence in the case.

The judgment should be reversed and a new trial ordered, with costs to abide the event, unless, within twenty days after notice of this decision, the plaintiff stipulates to modify the judgment by deducting the amount before referred to, including the interest allowed upon it. If such deduction be made, then the judgment should be affirmed without costs of the appeal.

Judgment accordingly.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

PATRICK and others *vs.* THE EXCELSIOR LIFE
INSURANCE COMPANY.

The suicide of a person whose life is insured for the benefit of another is no defence to an action upon the policy, where there is no stipulation to that effect in the policy.

Although suicide has been called a felony, it will not avoid a policy containing a condition that the same shall be void if the assured shall die "in the known violation of the law of any state."

An applicant for life insurance was asked the question whether he had any "serious disease?" On the trial, the court was requested to charge that if the insured ever had *any* disease, prior to the application, and did not disclose it, the plaintiff could not recover. *Held*, that the request was too broad; and that the court properly refused to charge as asked.

APPEAL, by the defendant, from a judgment entered upon a verdict, and from an order denying a motion, made upon the judge's minutes, for a new trial.

E. F. Shepard, for the appellant.

Henry Smith and *John R. Putnam*, for the respondents.

By the Court, LEARNED, P. J. This is an action on a policy of insurance on the life of Ralph T. Darrow, for the sole benefit of his wife, Mary E. Darrow. The policy did not contain any clause making it void in case of the suicide of the insured.

The defences relied on were, the suicide of the insured, and his breach of the warranties contained in his application.

The case of *Fitch v. American Popular Life Ins. Co.*, in the Court of Appeals, (11 *Albany Law Jour.*, 91; 59 *N. Y.*, 557,) has settled the doctrine that in the case of a policy for the benefit of the wife, the suicide of the insured is not a defence, where there is no stipulation to that effect in the policy.

Patrick v. Excelsior Life Insurance Co.

This doctrine makes the question of sanity, or insanity, immaterial in this case, and disposes of most of the points raised by the defendants. For I do not think that the expression, "in the known violation of the law of any state," can be construed to include suicide; although suicide has been called a felony. (4 Bl. Com., 189.)

In the case above cited, the application for insurance declared in very strong language that all the statements were warranties and the basis of the contract. Yet the court held that, looking at all the papers, and considering the character of the minute inquiries made of the applicant and other circumstances, the true construction was that the policy was void, only in case of intentional and fraudulent misrepresentation or suppression.

In this present case, however, the court charged favorably to the defendants on this point; holding that the representations amounted to a warranty.

The court declined to charge that if Darrow ever had any disease, prior to the application, and did not disclose it, the plaintiff could not recover. This request was too broad. The language of the question put to the applicant was whether he had any "*serious*" disease. Besides, the only evidence on the trial as to any disease had reference to rheumatism and the disease of the legs. And on these points the court had already charged as the defendants requested.

The court was asked to charge that if Darrow had not always been sober and temperate, the plaintiff could not recover; and declined to modify what had been already said on that point. The court had already charged that false representations made, in answer to the inquiries, avoided the policy. And he had called the attention of the jury to the representation that the deceased was a sober and temperate man, and he had left it to the jury to determine what the parties meant in that representation, in view of the ordinary transac-

Patrick v. Excelsior Life Insurance Co.

tions, purposes and business of mankind. He was not requested by the defendant to declare, as matter of law, the meaning of the words sober and temperate. And perhaps their meaning is best left to the jury's knowledge of language. At any rate, there was no refusal by the court to explain the meaning. There was some evidence that Darrow had been seen intoxicated two or three times within four or five years previous to the application. And the court left it to the jury to say, on the evidence, whether his habits were sober and temperate.

There was a motion for a new trial on the minutes. On what grounds does not appear. Probably none were ever presented to the court below. There could be no question as to the amount to which, if to anything, the plaintiff was entitled.

If it be claimed that the verdict is against the weight of evidence, it is to be noticed that the medical examiner of the company stated in his report to them, at the time of the application, that Darrow had had slight attacks of sciatica. And in his testimony at the trial he stated that Darrow so told him. Dr. Hamilton testified that Darrow did not use a crutch before the early part of 1870. (The policy was taken out in February 1870.) Darrow's partner testified that he did not walk lame prior to 1870. Mr. Bean testified that the first he knew of Darrow's lameness was in 1871. Dr. Babcock saw Darrow with a crutch or cane two years before he died,—(died April 28, 1872,)—and had the impression that Darrow had *locomotor ataxia*; but did not examine him. Mr. Hill's testimony refers to a short time before Darrow's death.

From the examination of the evidence we cannot say that the verdict was contrary thereto. The physician who merely saw Darrow walking in the street only stated an impression as to the existence of paralysis.

Keese v. New York, New Haven &c. R. R. Co.

And even the time when he saw Darrow is not fixed with certainty.

The judgment and order appealed from should be affirmed with costs. (a)

Judgment accordingly.

[THIRD DEPARTMENT, GENERAL TERM at Albany, January 5, 1875.
Learned, Boardman and James, Justices.]

(a) *S. C.*, reported briefly, 4 *Hun*, 263.

FREDERICKE KEESE, administratrix, &c., vs. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Although a railroad company exhibits negligence by running its engines through a populous city at a rapid rate, yet if a party injured thereby contributes, in any degree, by his own negligence, to the injuries received, the company is absolved.

The law does not require that the sight and ears of a person crossing a railroad track shall be immaculate or infallible, but that he shall use them to avoid injury. He may err in judgment; his ears or his eyes, or both, may deceive him, and his judgment thus being at fault, he may contribute to the injuries he receives, and go without remedy; but whether he did so or not is a question for the jury; unless the evidence plainly admits of but one conclusion, and that, that he was guilty of negligence. *Per BRADY, J.*

If the evidence upon the subject of contributory negligence is conflicting, it is proper for the court to refuse to dismiss the complaint.

Where the son of a person injured by the defendant's locomotive, who was with him when he was injured, testified that when they came up to the railroad track, they stopped, before crossing it, and each looked both ways, up and down the track, but could not hear if any locomotive was coming; and that there was no whistle blown or bell rung; *held* that this was doing all that the party was bound to do; and that proper diligence, observation, care and caution on his part was shown.

A PPEAL by the defendant from a judgment entered on the verdict of a jury.

Keese v. New York, New Haven &c. R. R. Co.

Calvin G. Child, for the appellant.

Field & Minor, for the respondent.

BRADY, J. This action was brought to recover the damages sustained by the widow and next of kin of John Keese, deceased, who died from injuries received through the alleged carelessness of the defendant. The case was submitted to the jury on conflicting evidence as to material points, clearly and fully. The requests of the defendant's counsel were granted, and no exception was taken to the charge of the presiding justice. The only exception open for review is the refusal of the court to dismiss the complaint. The decision on that subject was proper. The deceased was bound, under the stringent rules of law prevailing in this state, to use his eyes and ears, to shield the company from the consequences of its own neglect exhibited by running its engines through a populous city at rapid rates. The proposition thus stated is not at all exaggerated, because if the deceased contributed in any degree by his own negligence to the injuries received, the defendant is absolved.

The defendant had the benefit of this rule, and of all rules bearing upon the subject to which the attention of the court was called.

The plaintiff's case established proper diligence, observation, care and caution on the part of the deceased — the use of eyes and ears — before attempting to cross the defendant's track. The law does not require that the sight and ears of the wayfarer shall be immaculate or infallible, but that he shall use them to avoid injury — an incident more likely to occur than its opposite. It is not presumable, on a just consideration of the affairs of this life, that a man will use his eyes and ears to incur danger — to simulate only, and not to act — but that

Keese v. New York, New Haven &c. R. R. Co.

yielding to the instinct of self preservation he will avoid, not seek danger.

He may err in judgment. His ears or his eyes, or both, may deceive him, and his judgment thus being at fault, he may contribute to the injuries he receives and go without remedy ; but whether he did so or not is for the jury, unless the evidence plainly admits of but one conclusion, and that, that he was guilty of negligence. In this case, for example, the son of the deceased, who was with him when he was injured, stated that when they came up to the railroad track they stopped before crossing it. They each looked both ways—each looked up and down the railroad track—each listened, but could not hear if any locomotive was coming, and that there was no whistle blown or bell rung.

This was doing all that the deceased was bound to do, and there was nothing in the case, when the motion to dismiss was made, which so far overcame the statement thus made as to make it apparent that the deceased had, by his own negligence, contributed to the injury. It must also be said that the motion was first made when the defendant rested, and before the rebutting testimony given on the part of the plaintiff had been put in. It was received, it is true, upon the close of the case, but the issues depending were then in more serious doubt than when the defendant rested, in consequence of the further testimony given on behalf of the plaintiff.

The case as finally submitted was one containing diverse evidence on several features. The only persons present at the time of the accident who saw it were the plaintiff's son and the engineer of the train. They were in contradiction on three subjects, namely ;—the weather, whether clear or foggy, whether a signal was given of an approaching train, and as to the manner in which the deceased was conducting himself—whether walking down or across the track. The engineer was

Keese v. New York, New Haven &c. R. R. Co.

indeed on these subjects, or some of them, inconsistent in his statements, and therefore subject to criticism, which was, no doubt, indulged in by the counsel for the the plaintiff, and which might be employed here, if necessary.

It is true that there are some circumstances growing out of the evidence given on behalf of the defendant which tend to show that the son of the deceased was mistaken as to some things; but there are not wanting circumstances to show that in reference to them he was right, the case being considered on the whole of its incidents. The counsel for the appellant has presented his side of this appeal in a very elaborate manner, one indicating industry, ingenuity and research; but although there are numerous adjudications on questions of negligence, and many in which the courts have reviewed and reversed the verdict of juries; each case must fall or stand on its own merits.

We can gather from these decisions the rules which must govern our deliberations, and receive instructions from them by analogy, but the facts in each case differ, and no one furnishes, therefore, for the other an absolute guide, except on the rules suggested. In this case the right of the plaintiff to recover depended upon the statement of the son of the deceased and such corroboration as the testimony given in addition to his, furnished—a statement to be considered in connection with the evidence on the part of the defendant.

The whole case presented, as already mentioned, and as shown by the charge of the court, a conflict of proof, and upon it the jury, fully and correctly instructed as to the law, have pronounced against the defendant. The finding is sustained by the evidence, and the judgment should be affirmed, with costs.

DANIELS, J., concurred.

Kennedy v. Barandon.

DAVIS, P. J. There are grave reasons to believe that the intestate was guilty of negligence which caused his own death. But on that subject, the question of fact seems to have been properly submitted to the jury. I must therefore concur.

Judgment affirmed.(a)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hun*, 678, *sub nom. Kuse v. Same defendant*.

KATE KENNEDY vs. GEORGE BARANDON and JOHN
BARANDON.

Although it is the usual and the better practice, in actions in the nature of creditors' suits, on a judgment for the plaintiff, to direct the appointment of a receiver and a sale by him; yet it is not improper to adjudge that the property be sold on execution, by the sheriff.

If the complaint, in such an action, is not filed on behalf of the plaintiff and other creditors similarly situated, and it does not appear that there are any other creditors, the judgment should only declare the conveyances fraudulent and void as to the plaintiff's judgment, and direct a sale for the payment of that, alone, with costs.

A provision, in such a judgment, directing that the surplus moneys on the sale be brought into court, is not appropriate to the case.

A PPEAL, by the defendants, from a judgment rendered at a Special Term.

The action was brought by a judgment creditor of the defendant George Barandon, to set aside, as fraudulent and void, a mortgage upon two pieces of real estate in the city of New York, and also a deed of the same premises, executed by him to the defendant, John Barandon. The judgment rendered at the Special Term was in favor of the plaintiff, declaring the conveyances void as against creditors.

Kennedy v. Barandon.

Edward Van Ness, for the appellants.

Charles C. Bigelow, for the respondent.

By the Court, DAVIS, P. J. This action is in the nature of a creditor's bill, to reach the real estate of the defendant George Barandon, alleged to have been mortgaged and conveyed to the defendant John Barandon, with intent to hinder, delay and defraud the creditors of the former, and to defeat the collection of the judgment recovered by plaintiff against said John Barandon. The court found that the mortgage and conveyance were fraudulent, and gave judgment declaring the same fraudulent and void as against the plaintiff and other creditors, and setting the same aside, and directing that the real estate be sold on execution, by the sheriff, and that the judgment of the plaintiff and the costs of this action be paid out of the proceeds of the sale, and the surplus be brought into court. The question in the case was purely one of fact. The defendant George Barandon was the principal witness for the plaintiff, and upon his testimony, chiefly, the court found its conclusions of fact.

There were no exceptions taken to the evidence. On a careful examination of the evidence we think the learned judge was fully justified in finding that the transactions between the defendants, in mortgaging and conveying the lands, were fraudulent and void. His conclusions in that regard ought not to be disturbed. It is the usual, and we think the better practice, in this class of cases, to direct the appointment of a receiver, and a sale by him ; but it has been held that it is proper to adjudge that the sale be made on execution by the sheriff. (2 *Van Sant. Eq. Pr.*, 158. *Orr v. Gilmore*, 7 *Lans.*, 345. *Wait's Pr.*, 655.)

Where the action and the judgment therein affects real estate only, the latter course is not to the prejudice

Gopsill v. Decker.

of the defendant, because the sale of the lands on execution, after the removal of the fraudulent incumbrance or conveyance, secures to the defendant, and to his other judgment creditors, the right of redemption provided by the Revised Statutes in cases of sales on execution. The complaint in this case was not filed on behalf of the plaintiff, and other creditors similarly situated, and it does not appear that there are any other creditors. The judgment should therefore have only declared the mortgage and conveyance fraudulent and void as to plaintiff's judgment, and directed the sale for the payment of that, alone, with the costs.

The provision of the judgment directing that the surplus on the sale be brought into court was not appropriate to the case made by the pleadings and proofs. (*Wilder v. Keeler*, 3 *Paige*, 164. *Kerr v. Blodgett*, 48 *N. Y.*, 62. *Wait's Pr.*, 653-4.) The judgment should be modified by striking out that direction, and, as so modified, affirmed with costs.(a)

Judgment accordingly.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported briefly, 4 *Hun*, 642.

GOPSILL vs. DECKER & MILLER.

An exception to the sufficiency of the sureties in an undertaking given upon an appeal to the Court of Appeals having been taken, notice of justification was duly given. One of the sureties was approved, and the other not being considered sufficient, an adjournment was had, to give the appellants time to give additional surety. The attorneys then agreed that both the persons offered should be taken as sureties, the appellants' attorney promising to have it "so marked by the court." This was not done; but the appeal proceeded as if it had been, and was heard and decided in favor of the respondent. In an action upon the undertaking; *held*, that the sureties could not

Gopsill v. Decker.

raise the objection that one of them failed to justify, and that the approval of the sureties, on justification, was not made, nor the allowance indorsed on the undertaking, as contemplated by section 196 of the Code.

A PPEAL, by the defendants, from an order granting a new trial.

Hatch & Van Allen, for the appellants.

E. A. Doolittle, for the respondent.

By the Court, BRADY, J. The defendants signed an undertaking on behalf of Joseph K. Heath to enable him to have a decision of the General Term of this district reviewed by the Court of Appeals, which was made against him in an action wherein the plaintiff herein was also plaintiff and Heath was the defendant. After the undertaking had been executed, and in due time, the plaintiff excepted to the sufficiency of Decker & Miller as sureties, and notice of justification was duly given. The defendant Miller was examined, and approved by the plaintiff's counsel. The defendant Decker was also examined, but was not then considered sufficient, it would seem, and an adjournment was had "to give the defendants' attorneys time to give additional surety." Subsequently, however, the attorneys for the parties respectively agreed that the defendants should be taken as sureties. This was done at the special request of one of the defendants' attorneys, who promised to have it "so marked by the court;" which was not done. The appeal, nevertheless, proceeded as if it had been done, and was heard and decided in favor of the respondent.

The defendants on the trial of this action, which is predicated of the undertaking signed by them, now object that the defendant Decker failed to justify, and that the approval of the sureties on justification was not made, or the allowance indorsed on the undertaking, as con-

templated by section 196 of the Code of Procedure. There are several answers to these objections.

The first is, and it is stated with regret, that the objections show a want of good faith. The surety who was supposed to be insufficient was accepted at the special request of one of the attorneys for the defendant Heath, and he promised to have the indorsement referred to made. This court would not permit, except in an extreme case which cannot well be conjectured, any such objections to prevail, under the circumstances disclosed. To give them force would be to permit the defendants to take advantage of their own wrong.

Again; the surety was not rejected by the court, or declared to be insufficient. There is no evidence of such an incident. The justification seems to have been conducted by the attorneys for the respective parties without any intervention of the court. They met and adjourned by agreement in writing, and the obligation to give another surety was waived and the defendant Decker accepted by agreement in writing.

This amounted to a waiver of the justification which the plaintiff's attorney had a legal right to accomplish, if he chose so to do. It was an act for the benefit of the defendant Heath, in whose behalf the sureties appeared and executed the undertaking. A waiver will result even from a failure of the respondent to attend the justification, although the sureties also fail to attend. (*Ballard v. Ballard*, 18 N. Y., 491.) The party excepting is the actor in the proceeding, and no step is necessary to be taken, except on his requisition. The indorsement of the allowance was therefore unnecessary. (*Id.*) If the sureties, or one of them, failed to justify and the appeal fell through, they would not be liable, (*Ward v. Syme*, 4 Comst., 171;) although that rule is an innovation upon that which formerly prevailed, and by which the bail were bound, notwithstanding they failed to justify, unless on their motion their names

Livingston v. Murray.

were stricken out or an exoneretur as to them entered. (*Id.*) In this case it appears that the appeal of the defendant Heath, as already stated, was not superseded or arrested. He had the advantage of it on the faith of the undertaking executed by the defendants.

Whether, therefore, we consider the facts narrated in the light of a waiver, or as creating a legal necessity, the appeal herein is unavailing, and the order granting a new trial should be affirmed. The dismissal of the plaintiff's complaint was an error which the order granting a new trial corrected. If the question were whether, in order to relieve the sheriff of the responsibility assumed by taking bail, it was necessary to have an indorsement on the undertaking required by section 196, the result of this appeal would, doubtless, be different.

The adjudications relating to that subject, however, have no application here. The order should be affirmed, with \$10 costs and disbursements. (*a*)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(*a*) *S. C.*, briefly reported, 4 *Hum*, 625.

CAMBRIDGE LIVINGSTON, executor, &c., vs. AGNES
MURRAY, impleaded, &c.

A testator, by his will, divided the rest and residue of his estate equally among his children and the lawful issue of such of them as might die before the period of his own decease. He then declared it to be his wish that his executors should cause the portion that might belong to his daughters "to be secured for them for their separate use during their natural lives free from the control of any husband. * * And in case of their dying without issue, such portion of their said property as may remain at the time of her or their death, shall revert to her or their surviving brothers and sisters, or to their issue in case of their death, as hereinbefore provided for, subject, however, to the right of such daughter to dispose of one-half of such property,

Livingston v. Murray.

by will * * *." A codicil provided for the payment of certain legacies out of the estate not given by the will, and then proceeded to describe the interests designed to be given to the testator's children, because there might be some obscurity in the will as to the title to their portions. He then again gave the residue of his estate, in equal portions, to his children and the lawful issue of such as might die before him, as he previously had done by the terms of the will, to his sons in fee simple and absolutely, and to his daughters, "an estate for life, remainder to the lawful issue of each respectively, if any such they leave, in fee simple and absolutely, subject to the right of my said daughters to dispose of one-half of their share by will, as in my said last will and testament provided." The testator then empowered his executors to rent the real estate, and divide the net income, or balance of the rents, among the parties who would be entitled to the proceeds of the realty if sold; "and in case any of my said daughters die without leaving issue, then such portion of her share as she shall not have devised or bequeathed * * shall pass to her or their brothers and sisters, or to their issue in case of their death, as in said will provided."

- Held*, 1. That the interests provided for the daughters by the will were essentially modified by the language used in the codicil.
2. That the codicil gave to each daughter a life estate in her share, without the right to control or reduce the capital, except by her will, and restrained her power in that respect to one-half the amount of the share provided for her.
 3. That this authority over the share was not repugnant to the purpose of limiting the interest of each daughter to a mere life estate.
 4. That the testator evidently designed that the shares of the daughters should not go into their possession, or be subjected to their control.
 5. That the testator contemplated some disposition of the share of each daughter which would secure it for her use, free from the control of her husband; and that could only be properly effected by the intervention of a trust.
 6. That the court had the power to appoint a trustee, to whom the interest of a daughter of the testator, in his estate, should be transferred, and who should hold the same as her trustee, and pay over to her the income thereof during her natural life.

APPEAL, by the defendant, from a judgment entered upon the report of a referee.

The action was brought by the plaintiff as executor of James B. Murray, deceased, for a judicial construction of the will of the said James B. Murray, and a codicil thereto, and for a settlement of the executor's accounts, and a final determination of the rights of the parties interested in the estate. The appellant is a

Livingston v. Murray.

daughter of the testator, entitled to participate in his estate by the terms of the will and codicil. By the judgment which was entered, her interest was declared to be a life estate merely, in a certain portion of the personal assets under the control of the executor, and they were required to be transferred by him to the New York Life Insurance and Trust Company, to be held by it as her trustee, and the income therefrom paid to her during her natural life. She excepted to the report of the referee directing this disposition of her interest in the estate, and appealed from the judgment entered to carry the direction into effect.

Joseph H. Choate, for the appellant.

Grosvenor P. Lowery, for the respondent.

By the Court, DANIELS, J. It is not claimed, in support of the appeal, that any error intervened as to the amount of the estate which should be appropriated for her use, nor in the selection of the trustee, if one must be provided for her. But it is insisted that the property transferred was absolutely her own under the terms used in the will and codicil, and should have been delivered over to her for her use and enjoyment. By the will which was made by the testator, he divided the final rest and residue of his estate remaining after payment of his debts and funeral expenses, equally among his children and the lawful issue of such of them as might die before the period of his own decease. He then declared it to be his wish that his executors should cause the portion that might belong to his daughters, "to be secured for them for their separate use during their natural lives, free from the control of any husband with whom they have been, or may at any time be, intermarried. And in case of their dying without issue, such portion of their said property as may remain, at the time

of her or their death, shall revert to her or their surviving brothers and sisters, or to their issue in case of their death, as hereinbefore provided for, subject, however, to the right of such daughter to dispose of one-half of such property, by will, in such manner as she may think proper."

The codicil provided for the payment of certain legacies out of the estate not given by the will, and then proceeded to describe the interests designed to be given to the testator's children, because there might be some obscurity in the will as to the title to their portions. He then again gave the residue of his estate, in equal portions, to his children and the lawful issue of such as might die before him, as he previously had done by the terms of the will, to his sons in fee simple and absolutely, and to his daughters, "an estate for life, remainder, to the lawful issue of each respectively, if any such they leave, in fee simple and absolutely, subject to the right of my said daughters to dispose of one-half of their share by will, as in my said last will and testament provided." The testator then empowered his executors to rent his real estate while it remained unsold, and "to divide the net income, or balance of the rents, among the parties who would be entitled to the proceeds of said realty if sold, or the benefit thereof, and in case any of my said daughters die without leaving issue, then such portion of her share as she shall not have devised or bequeathed, as herein or therein provided, shall pass to her or their brothers and sisters, or to their issue in case of their death, as in said will provided."

These are the only clauses of the will and codicil which appear to require consideration in determining the disposition which should be made of this case, and it is entirely evident from them that the interests provided for the daughters, by the will, were materially modified by the language used in the codicil. By the former their shares were required to be secured to them

Livingston v. Murray.

for their separate use during their natural lives, free from the control of their husbands, and that contemplated the creation of some trust similar to that provided for by the judgment, in order to carry out and secure the purpose of the testator. But it was subject to the right of the legatees to use the capital, as well as the income, of their respective shares. For it was only such portion as remained at the daughter's decease without issue, which was to revert to her surviving brothers and sisters, or their issue; and that, by implication, conferred the right to diminish the share by use during the lifetime of the legatee.

But the codicil expressly reduced and confined the daughters' residuary legacies to mere life estates, in their respective shares, and limited the remainder to the lawful issue in fee simple and absolutely, afterwards, subject only to the right to dispose of one-half the share by will. This deprived the daughters of the right to use any portion of the principal of their respective shares. It was not in case any remainder was left, that the limitation over was to take effect. But the entire remainder was limited to the daughter's lawful issue, if any such issue were left; and if there were none, the share would follow the direction contained in the will and codicil, and revert to the surviving brothers and sisters, or their issue in case of their death. This construction of the terms used in the codicil is confirmed by the provision afterwards contained directing the disposition of the rents while the real estate remained unsold. By that it was declared that such portion of the share of any daughter who should die without issue, as she shall not have devised or bequeathed, as in the will and codicil was provided, should pass to her brothers and sisters, or their issue, in case of their death. This contemplated but one contingency which could by any possibility reduce the share intended to be disposed of, and that was the will of the daughter for whom the

share was provided, which could bequeath not exceeding one-half of it. Subject to that power over it, the remainder was limited in positive terms to the lawful issue of the daughter for whom the life estate was provided, if any such shall survive her, and if not, then to her surviving brothers and sisters, and the issue of such as she may survive. That this was substantially the modification effected by the codicil seems to be clearly indicated by the terms the testator used to express his design. It gave each daughter a life estate in her share, without the right to control or reduce the capital, except by her will, and restrained her power in that respect to one-half the amount of the share provided for her. It was claimed in behalf of the appellant that this authority over the share was repugnant to the purpose of limiting her interest to a mere life estate. But that is very evidently a misapprehension of the effect of the legal and equitable principle relied upon for its support. In order to be attended with that result the power of disposition must be general in its terms, extending to the whole of the fund or interest created for the benefit of the legatee. (*Tyson v. Blake*, 22 N. Y., 558, 563. *Terry v. Wiggins*, 2 Lans., 272, 275. S. C., 47 N. Y., 512. *Taggart v. Murray*, 53 *id.*, 233.) While, in the present case, it could only be made by will, and that was restrained, in express terms, to one-half the share created.

The learned counsel for the appellant insisted, farther, that no authority existed for the creation of a trust for her protection, and that of those entitled in remainder of the share provided for her. But that appears to result from the direction given by the will, which the codicil did not disclose it to be the purpose of the testator to change. That was, that the executors should cause the portion belonging to her to be secured for her separate use, during her natural life, free from the control of her husband. This is the substance, though not the literal terms, of the direction. It was given in

Livingston v. Murray.

words including all the testator's daughters, having the effect over the share of each, which has just been stated. And that rendered it the executor's duty to procure some special investment or disposition of the interest provided, which would secure it to the daughter's use free from the control of her husband. By the direction which was given, the testator contemplated a different disposition from payment to the daughter herself. It was in terms to be one which would secure the share for her separate use free from any control over it by her husband.

The testator did not suppose that this could be accomplished by delivering the share into her possession. That might be attended with that result, under the statutes made for the protection of the rights of married women. But it would not be surely or certainly the case; for, notwithstanding the statutes, the wife may yet voluntarily surrender the property, under her control, to the possession and disposition of her husband. The testator intended to avoid even that possibility, and for that purpose he required the executors to secure the daughters' shares for them free from the control of their husbands. And to do that he must have contemplated some such disposition as was made of the share by the judgment of the court. But whether he did or not, it was a very proper one to accomplish the end he declared should be secured; and it is supported by the practice of courts of equity in cases of this description. It was held by Lord Hardwicke, and approved by Chancellor Walworth, that where trusts are merely executory, and something remains to be done to perfect and carry into effect the testator's intention, the court is not confined to the strict rules of common law, but governs itself by the testator's intention, and does that which will best answer and support it. (*Wood v. Burnham*, 6 *Paige*, 513, 519.) The testator contemplated some disposition of the share which would secure it for

 People v. Bixby.

his daughter's use free from the control of her husband. And that could only be properly effected by the intervention of a trust like that provided for by the judgment.

By requiring the executor to secure it in that manner, he evidently designed that it should not go into the possession, or be subjected to the control, of his daughter. The judgment was right, and it should be affirmed with costs (*a.*)

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875. *Davis, Brady and Daniels*, Justices.]

(*a*) *S. C.*, reported briefly, 4 *Hun*, 619. Modified and affirmed by Court of Appeals, February 26, 1877. (See 10 *Hun*, xvii.)

THE PEOPLE, *ex rel.* Emma Lee and others, *vs.* BUTLER
H. BIXBY and others, constituting a court of Special Sessions, &c.

Where six women made an indecent exposure of their persons, for money, to five men present and paying therefor; *held*, that such exhibition made the room wherein it occurred a "public place," within the meaning of the statute, although it was a room in a house of prostitution, and not open to the general public.

Held, also, that the offence being a misdemeanor committed by all, at the same time, each aiding and abetting every other, the offence was joint, and the offenders could be jointly prosecuted and convicted.

CERTIORARI to review a conviction of the relators of the crime of indecent exposure.

William F. Howe, for the relators.

B. K. Phelps, (district attorney,) for the people.

People v. Bixby.

By the Court, DAVIS, P. J. Two questions are made in this case.

First. That the indecent exposure was not made in a "public place."

Second. That the relators could not be jointly prosecuted and convicted. As to the first of these questions, we are of opinion that the exhibition made by the six relators, for money, to the five men present and paying therefor, made the room where it occurred a public place within the meaning of the statute, although it was a room in a house of prostitution, and not open to the general public. Any place may be made public by a temporary assemblage, (*Bishop on Statutory Crimes*, 298;) and this is especially so when the assemblage is gathered to witness an exhibition for hire. It is obvious, from the evidence in this case, that the room where the acts took place was one used for such purposes, whenever persons could be induced to attend and pay for the same.

As to the second point. The offence was a misdemeanor committed by all the relators, at the same time, each aiding and abetting every other, and all joining to make the exposure indescribably indecent. We think it was a joint offence; and we see no reason why the offence of indecent exposure, under the statute, may not be jointly committed, where several persons agree in concert to do the acts which constitute the crime, for the purpose of making a common exhibition. It has been so held in this class of cases, by the English courts. (*Rex v. Orchard*, 3 Cox, 248. *Rex v. Harris*, 11 *id.*, 659.) The proceedings should be affirmed and the writ dismissed. (a)

Judgment accordingly.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875. *Davis, Brady and Daniels*, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hun*, 636.

TERENCE P. SMITH *vs.* THE MAYOR &c. OF THE CITY
OF NEW YORK.

A "messenger to the president of the board of aldermen" in the city of New York, is not a public officer; nor are his duties of an official character; there being no statute creating such an office or defining the duties to be performed officially. Hence the appointment of a person as messenger, and subsequently providing for an increase of his salary, are not within the prohibition of section 11 of chap. 876 of the Laws of 1869.

The plaintiff was appointed messenger by the clerk of the common council. Subsequently, the common council increased his salary. *Held*, that by this action the common council recognized the right of the clerk to make the appointment; and that the board having the right to delegate the power of appointment, the court would presume, until the contrary was shown, that the clerk had been duly authorized to make the selection.

Collins v. Mayor &c. of New York (3 *Hun*, 680) distinguished.

APPEAL, by the defendants, from an order made at a Special Term, overruling a demurrer to the complaint.

On the 1st day of January, 1869, the plaintiff was appointed messenger to the president of the board of aldermen of the city of New York, by the clerk of the common council, at a salary of \$1,500 per annum. On the 23d of October, 1869, the board of aldermen increased his salary to \$2,500 per annum. This action was brought to recover the amount of the difference between the original and the increased salary.

D. J. Dean, for the appellant.

C. Miller, for the respondent.

By the Court, DAVIS, P. J. The complaint does not show that the plaintiff held a public office. On the contrary, its allegations show him to have been a mere servant of the president of the board of aldermen. He alleges that he held "the position and performed the duties of messenger to the president of the board of aldermen." The duties of that place are not official. No statute is shown creating such an office, or

Smith v. Mayor &c. of New York.

defining the duties to be performed officially. In this material respect the case differs from *Collins v. The Mayor &c.* (3 *Hun*, 680.) In that case it was held that the plaintiff was an officer because the office of his principal was one created by law and its duties were official, and that his deputy or assistant clerk was appointed to perform some portion of the official functions of the clerk himself. But a "messenger to the president of the board of aldermen" cannot be supposed to perform the official functions of the president. He serves him in no official capacity in carrying messages and running errands, and is clothed with no power to perform any official duty of that office.

The case is not brought by the pleadings within the prohibition of section 11 of chap. 876 of the Laws of 1869.

Other facts may be shown upon the trial.

It is objected that plaintiff was appointed by the clerk of the common council, and that the clerk had no power to make such appointment.

The action of the board of common council in increasing the salary recognized the right of the clerk to make the appointment. And as the servants of the board of aldermen or of its president might be appointed by any of the officers to whom the board saw fit to commit that duty, we must presume that the clerk had been duly authorized to make the selection, until the contrary be shown.

The order below should be affirmed with costs, and with leave to the defendants to answer on payment of costs.(a)

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hun*, 644.

MARKS vs. KING.

The order of proof, on the trial, is, in general, if not always, a matter of discretion with the court, and therefore not reviewable.

In an action brought against the defendant as indorser of a promissory note, the defence was that the indorsement was a forgery. On the trial, the defendant offered to prove that a witness, called by the plaintiff, had been instrumental in getting one B. indicted for the forgery of the note in suit, insisting that if he was so instrumental it militated against, and impaired his opinion, previously given in evidence, to the effect that the indorsement was genuine. *Held*, that this was not necessarily so; and that the evidence was properly excluded.

MOTION for new trial, on a case and exceptions. (*S. C.*, reported briefly, 1 *Hun*, 435; 3 *Thomp. & C.*, 778.)

G. W. Hotchkiss, for the plaintiff.

Chapman & Martin, for the defendant.

By the Court, BOCKES, J. This case comes before the court on a case and exceptions, ordered to be heard in the first instance at General Term.

The action was brought against the defendant as indorser of a promissory note made by E. B. Bell, for \$2,000, dated April 4, 1870, payable thirty days after date, at the Susquehanna Valley Bank. The defence was, that the indorsement was a forgery. Evidence was given tending to show the genuineness of the indorsement, and letters and admissions of the defendant were introduced bearing on the question, which, uncontradicted and unexplained, fully established the plaintiff's case. Evidence in explanation and in contradiction, however, was given. On all the proof the jury found a verdict for the plaintiff. No suggestion is made that the verdict is unsupported by proof; but in the course of the trial numerous exceptions were taken to the rulings of the court on questions of law, three of which are

Marks v. King.

now urged upon our consideration. These alone (those not now urged we must deem to be waived) will be examined. The first and second relate to the admission, and the third to the rejection, of evidence.

(1.) The first question raised by the defendant's counsel is, that the court erred in admitting in evidence the two drafts obtained by Bell, the maker of the note in suit, from the Susquehanna Valley Bank, each for \$1,000, and dated March 2d, 1870. Waiving the question of the order of proof, which in general, if not always, is a matter of discretion with the court—hence not reviewable—I am of the opinion that the evidence was competent. As the case stood when the trial closed, on the proof, it might well have been urged before the jury, 1st, that those drafts went to pay a \$2,000 note at the Jersey City Bank, on which the defendant was confessedly liable; 2d, that they were obtained on a note of the same amount, purporting to be indorsed by the defendant, and discounted by the Susquehanna Bank; to secure which the note in suit was made and indorsed; and, 3d, that the defendant, never denying his liability on the first note, had in fact repeatedly admitted his liability upon the last one.

There was evidence in the case bearing on these several points; hence, as the learned judge remarked in his charge, if the jury should find those facts to have existed, it would remain for them to say what weight should be given them in determining the defendant's liability; which was wholly and flatly denied by him. The transactions connected with these notes bore directly upon the defendant's explanations and denials of the evidence submitted on the part of the plaintiff; and the leading fact in this line of evidence and logic was this, (if it really had existence,) that those drafts went to defendant's benefit, and that their origin and use were known to him, as might well be presumed from all the

Marks v. King.

proof in the case. In this view, holding in mind the condition of the case on the evidence submitted on both sides, I am of the opinion that the admission of the evidence, connected with those drafts and their introduction, was not error.

(2.) These considerations, as I think, in effect answer the objection urged to the admission of the check of February 7, 1870. The transactions connected with the discount and payment of the several notes on which the defendant's name appeared, were here properly under examination. For whose benefit they were discounted, and by whom and in what manner they were paid or satisfied, were circumstances proper to be looked into and known. As the case was presented, a wider range of examination on all these points was admissible.

(3.) The offer to show, by the witness, Dickinson, that he was instrumental in getting Bell indicted for the forgery of the note in suit, was manifestly irrelevant and immaterial. It is claimed that if he was so instrumental, it militated against and impaired his opinion previously given in evidence, to the effect that the indorsement was genuine. Not necessarily so. He might have doubted whether the defendant would swear before the grand jury that the indorsement was not his; and might have desired to put the defendant to the test of his oath. So, with a view to try the defendant's sincerity in his assertion that his name on the note was a forgery, he might have aided in procuring his attendance before the grand jury, and thus been in fact instrumental in obtaining the indictment, notwithstanding his settled conviction and full belief that the indorsement was genuine. In the exclusion of the offer there was no error.

The three grounds of error above considered are alone presented for our examination. Neither of these are

Blanchard v. Western Union Telegraph Company.

deemed to be supported; and it follows that the plaintiff should have judgment on the verdict.

So ordered. (a)

[THIRD DEPARTMENT, GENERAL TERM at Elmira, May 7, 1874. *Miller, Bockes and Boardman*, Justices.]

(a) Affirmed in Court of Appeals, February 8, 1876. (64 N. Y., 628.)

BLANCHARD and others vs. WESTERN UNION TELEGRAPH COMPANY.

A telegraph company, authorized to lay its cable across a navigable river, but in a way not "to injuriously interrupt navigation," has, to that extent, the protection of the statute, in laying its cable; and such protection will cover all necessary and absolute inconveniences resulting from the exercise of the legal right.

If due care be used in laying the cable, in proper position, on the bottom of the river-bed, it will not be deemed a nuisance, as an interruption of navigation.

But where a cable, as placed by a company, did not lie on the river-bed, but was within reach of vessels, such as usually navigated the river at that place, and the plaintiffs' vessel caught upon it, and was injured; *held* that this was an obstruction to navigation, not necessary to carry out the purpose for which the company was organized; and that the company was liable for the damages occasioned thereby.

APPEAL, by the defendant, from a decision in favor of the plaintiff, made at Special Term, on a trial by the court without a jury.

The action was brought by the plaintiffs, as joint owners of a steam towboat, navigating the Hudson river, for damages received by said boat by running foul of a telegraph cable of the defendant which crossed the river at a railroad bridge at Albany.

This court, at General Term, reversed the judgment of the Special Term, and granted a new trial, *BOARDMAN, J.*, delivering a brief opinion in favor of reversal,

Blanchard v. Western Union Telegraph Company.

which was concurred in by MILLER, P. J. (*See 3 Thomp. & C.*, 775.) BOCKES, J., delivered the following dissenting opinion, which was approved and adopted by the Court of Appeals, on reversing the judgment of the General Term, ALLEN, J., saying: "The judgment at Special Term is well vindicated and sustained, by the very satisfactory dissenting opinion of Judge BOCKES, in the Supreme Court," &c. (*See S. C.*, 60 *N. Y.*, 513.)

By the Court, BOCKES, J. The decision of this case depends upon the question, whether the facts are found correctly by the learned judge before whom the cause was tried. There can be no doubt, I think, in regard to the law of the case. The defendant's company were authorized to lay the cable across the Hudson river; but in a way not "*to injuriously interrupt*" navigation. To this extent the company had the protection of the statute in laying the cable; and such protection would cover all necessary and absolute inconveniences resulting from the exercise of the legal right. Thus if the navigation of the river was made in some degree inconvenient by reason of an absolute necessity resulting from the laying of the cable, such mere inconvenience would not be deemed in law an injurious interruption to navigation, amounting to a public nuisance. Where authority is given to construct a bridge with piers, there is of necessity some obstruction to the free use of the stream contemplated. Navigation may be, and generally is, to some extent interrupted by the supporting structures; for care and prudence must be exercised to avoid them. So it has been well remarked, that every bridge having piers in the channel may be said to be an obstruction, interrupting navigation, but it is not necessarily a nuisance. Public convenience and the necessities of trade often require the surrender of individual rights. At the present day the speedy transmission of intelligence is a necessity; and the partial and very limited interruption

Blanchard v. Western Union Telegraph Company.

to navigation attendant upon the laying of telegraphic cables across or under navigable waters must be permitted, although some inconvenience results. It was held, nearly a half century since, that a free navigation was not to be understood as a navigation free from such partial obstructions and impediments as the best interests of society might render necessary; and more recently it was asserted in sound reason, that what the public convenience imperatively demanded could not be called a public nuisance, even though it should cause some inconvenience, or affect private interests. Undoubtedly due care must be observed in the construction of these necessary and partial impediments to navigation, to the end that there shall be no abuse of the statutory authority. Piers which are to be the support of bridges, and cables used for telegraphing, must be properly located with reference to the convenience and safety of passing vessels. They must be so placed as not needlessly to offer obstructions. These views are fully supported by the cases cited by the learned counsel for the defendant. Therefore, if it be true that the cable which caused the injury here complained of was laid with due care, in proper position, on the bottom of the river-bed, the plaintiffs had no cause of action. The defendant's company, in that case, had neither done, nor suffered any wrongful act; for, so laid and maintained, the cable would not "injuriously interrupt the navigation" of the river, within the fair and reasonable construction of the law, which permitted them to carry their cable across the waters of the state.

We are now brought to an examination of the findings of fact by the learned judge who heard and decided the case. He found, in substance, that the cable was not laid on the bottom of the river, as it might and should have been; that as laid, it injuriously interrupted navigation, and caused the injury complained of, which occurred without the fault of the plaintiffs, their agents or

Blanchard v. Western Union Telegraph Company.

servants. Briefly stated, he found that the cable was improperly laid; and as laid, was a public nuisance. If these findings of fact are supported by the proof, a right of action was undoubtedly established. After a careful examination of the evidence, I am of the opinion that the facts are well found.

The evidence, as it seems to me, is abundant to show that the cable was improperly laid, or was out of place, and had so remained out of place for a long period of time. According to the evidence submitted, the cable did not lie on the river-bed, but was within reach of vessels, such as usually navigated the river at that locality. At least, it was proved that the plaintiff's vessel would strike the cable when passing, drawing from six to seven and a half feet of water, and this occurred repeatedly. The vessel would strike and slip over. Three witnesses so testify. Now here was certainly an obstruction to navigation; not necessary to carry out the purpose for which the defendant's company was organized; for the cable could readily be laid beyond the reach of passing vessels. Consequently navigation was "*injuriously*" interrupted, within the fair meaning and intendment of the law under which the defendant claims protection.

It is not the multiplicity of actual and individual injuries resulting from a matter complained of, that constitutes it a public nuisance. In the case of navigable waters, an obstruction may have been often passed with safety through good fortune, or the exercise of especial care and prudence, and yet the obstruction would in law be deemed a public nuisance, to be abated even before injury from it had actually occurred.

If calculated to produce injury to passing vessels, the obstruction would be held a nuisance, in determining the rights of parties, in case it caused but a single injury. So, in point of fact, a thousand vessels might pass an obstruction in safety, and yet a right of action exist as

Blanchard v. Western Union Telegraph Company.

to the next one, if injured thereby; and that, too, on the ground that the obstruction was in law a public nuisance. The fact that other vessels passed in safety would be evidence that the thing or subject complained of was not an obstruction, or could be avoided with reasonable attention and care, when the party, as in the present case, had a right to insist upon the exercise of prudence in order to avoid it. But the question would still be open in case of a single injury, whether navigation was not injuriously interrupted.

The right of action for the injury complained of was established, I think, unless it was made to appear that the plaintiffs' misconduct or negligence contributed to it.

It seems that the vessel was such as usually navigated the river at the locality where the injury occurred; and for aught that appeared, was in good condition. The plaintiffs had a right to the use of the waters at that point, and certainly were not negligent in attempting to pass the cable — especially as they had frequently before passed in safety, notwithstanding the cable was often touched or struck. At all previous times the vessel had slipped over uninjured, and there was nothing to indicate present danger. But, it is said, the fact that she did not then pass without injury, proves that she was unfit to make the attempt. This presupposes that the defendant had a right to float the cable, or to permit it to rake the keels of passing vessels; and that the owners were bound to construct their vessels so as to avoid injury from this cause. In the first place, the defendant had no right to rake the keels of passing vessels with the cable, for the very obvious reason that it could be readily so placed and retained in position as to avoid such necessity. But let it be conceded that the plaintiffs were bound to put their vessel in condition to allow its keel to be raked without danger of injury, there is no evidence that it was not so to their knowledge. To defeat the action on this ground, it should have been shown

Blanchard v. Western Union Telegraph Company.

that the plaintiffs had knowledge of the defect in the vessel, which contributed to the injury, or that the defect had continued so long that, with proper attention, they would have discovered it. (*Sherman v. Western Trans. Co.*, 62 *Barb.*, 150.) In this case MULLIN, J., says: "The defective condition of the bottom of the boat may not have existed sufficiently long to have imposed any duty in reference to it;" and that "if its condition was not known, or had not existed long enough to charge the party with notice of the defect," there was no negligence; and he adds, "negligence is never presumed." There is not any direct evidence in this case that the injury complained of resulted at all from any defect in the plaintiffs' vessel. That it did, is but matter of inference; not a certain existing fact. True, if entirely smooth there could be no catch, but a very small inequality in the surface, not amounting to a substantial imperfection or defect, might, when the vessel was slipping over a strained cable, operate as a catch; especially if aided by a very trifling cutting away by friction. According to the evidence the vessel was properly built, and was in good repair when the injury occurred. She was, too, in proper place, and was run with due care. For aught that appears, the sole cause of the injury was the improper position and action of the cable.

The findings of the learned judge are, as I think, well sustained by the proof, and the judgment should be affirmed, with costs.

[THIRD DEPARTMENT, GENERAL TERM at Albany, May 7, 1874.
Miller, Boeckes and Boardman, Justices.]

MORSE, administrator, &c., *vs.* BROCKETT.

MORSE, administrator, &c., *vs.* BROCKETT.

SAMUEL WHITE *vs.* MORSE, administrator, &c., and others.

E. M. agreed, on good consideration, to pay, take up and discharge, to the amount of \$20,000, the liabilities of S. W. as indorser or surety for A. W. and A. M. or the firm of which they were members. He took up some of those liabilities, to the amount of \$16,705.80, including three judgments against S. W., and those judgments were assigned to him (E. M.;) but he failed to perform his agreement in full. *Held*, that E. M. having, in effect, assumed the payment of S. W.'s liabilities to the extent of \$20,000, and agreed to satisfy them, he thereby became the principal debtor, and could not take the judgments to himself by assignment, and enforce them against S. W., contrary to his promise.

As between a first and second incumbrancer by mortgage upon the same premises, where the securities were given pursuant to one and the same arrangement, no money passing between the parties at the time, the second mortgagee has a right to insist that the first mortgage has no force, as against his junior mortgage, except to the extent that the prior mortgagee has performed the agreement under which such mortgage was given.

Accordingly, where the consideration of the first mortgage was the agreement of the mortgagee that he would take up and satisfy certain demands on which the mortgagor was liable, to the extent of \$20,000; *held*, that neither the mortgagee nor his personal representative could enforce such mortgage, to the detriment or injury of the mortgagor, except to the extent that he had performed the agreement which constituted its consideration and gave it validity.

And, less than \$20,000 having been paid by the mortgagee, on account of such liabilities; *held*, that the mortgage should be reduced, by a deduction of the deficiency.

A PPEALS, by Geo. E. Morse, from judgments entered upon the reports of a referee.

The first two actions were brought by Geo. E. Morse, as administrator &c. of Ellis Morse, deceased, against Samuel White and others, to recover the amount due upon three judgments recovered against the defendants and assigned to said Ellis Morse. Samuel White having died during the pendency of those suits, the same were continued against his administrator, D. Z. Brockett. The third action was brought by said Samuel White,

Morse v. Brockett.

against Geo. E. Morse, as administrator &c. and others, to restrain the foreclosure of a mortgage by advertisement under the statute.

(See *S. C.*, briefly reported, 3 *Thomp. & Cook*, 773.)

Conkling, Lord & Coxe, for the appellant.

C. & J. Mason, for the respondents.

By the Court, BUCKES, J. The defence in the first two suits above entitled, and the basis of action in the third, grew out of the same transaction, to wit: an alleged agreement entered into between Ellis Morse, deceased, and Samuel White, the last named being the defendant in the former suits and the plaintiff in the latter. Therefore the three actions were very properly heard and determined by the same referee, as the facts were the same in each. The referee found that in Nov. 1855, Samuel White was indorser or surety on commercial paper made by or for the benefit of the firm of A. Morse & Co., to an amount exceeding \$35,000; and that Alexander White, one of said firm, was indebted to him in the sum of about \$1,300; and that in order to secure him therefor, said Alexander confessed judgment for the sum of \$36,750, which was duly docketed and became a lien on the farm of the said Alexander, worth from \$30,000 to \$40,000; that in May, 1857, the intestate, Ellis Morse, made an agreement with said Samuel White that if he, said Samuel, would satisfy and discharge his judgment for \$36,750, and would procure John L. and DeWitt C. White, the sons of said Alexander, (to whom he had theretofore conveyed his said farm,) to execute and deliver to him, said Morse, a mortgage on said farm for \$10,000, he, said Morse, would pay, take up and discharge the amount of \$20,000 of the liabilities of said Samuel White as indorser or surety for said Alexander White and Alpheus

Morse v. Brockett.

Morse, or the said firm of which they and John H. Brown were members, at the same time representing that he had made an arrangement with said firm and Morse and Brown to obtain security for the balance of the \$20,000 he so agreed to take up and discharge; and that as part of the same arrangement or transaction, said Samuel was to receive from said John L. and D. C. White, a mortgage on said farm for \$22,000, to secure and indemnify him for the balance of his indorsements and liabilities for said firm and for the indebtedness to him on the part of Alexander, which mortgage he did receive June 5, 1857, pursuant to such arrangement, and that he still holds the same; that relying upon such agreement and in consideration thereof, said Samuel did, on the 1st day of June, 1857, execute and deliver to said Morse a satisfaction of his said judgment, and that the same was on the following day satisfied of record, and the said John L. and D. C. White executed to him, said Morse, the mortgage for \$10,000 on said farm, and the same was accepted by said Morse under said agreement, and the same was recorded and became a first lien on said farm after a judgment of about \$3,000. The referee further found that said Ellis Morse omitted to perform the agreement on his part; that he became the assignee of the three judgments mentioned in the first two above entitled actions, which were obtained on paper, such as he had agreed to pay, take up and discharge, and which the plaintiff, in such actions, his administrator, now seeks to enforce; and that the aggregate of all such paper paid, taken up and discharged by him pursuant to such agreement, including said judgments of which he became assignee and owner, computed to June 1, 1857, amounted only to the sum of \$16,705.80, leaving \$3,294.20 unapplied, contrary to the terms of his aforesaid agreement. The referee held that under this state of facts, the personal representative of Ellis Morse could not enforce those judgments,

Morse v. Brockett.

so obtained on paper which the latter had agreed to take up and discharge; nor could he enforce the \$10,000 mortgage to the detriment or injury of said Samuel White, beyond the amount remaining after deducting the said sum of \$3,294.20, so as aforesaid unapplied to paper on which the latter was liable, according to the terms of the agreement between them.

The first point raised and urged by the appellant's counsel is, that the findings of fact by the referee in regard to the agreement above stated is unsupported by the evidence. In this, I think, he is under mistake. Several witnesses testify to the agreement substantially as found. Certainly an agreement was made under and pursuant to which the respondent discharged his judgment of \$36,750 and two mortgages, one for \$10,000 to Ellis Morse, the other for \$22,000, to White, were executed and accepted. That the judgment was discharged and the two mortgages were given, is shown by the papers and records; and it is put beyond doubt that these acts were parts of the same transaction, and were done in pursuance of one and the same arrangement. It is not pretended that any money passed between the immediate parties, as a consideration for the discharge, or as a consideration for either mortgage. Nor is there any proof whatever of any other or different arrangement or agreement than that stated by the referee. Such agreement in substance is testified to, and proceedings were taken by the parties going to its recognition and fulfilment. None other is at all indicated or supported by the proof. It is not enough to meet the case to say that such arrangement was unreasonable as regards Ellis Morse—too improbable to be credited. Precisely what inducements then existed, which controlled Morse's action, may or may not be now apparent, after the lapse of so many years. It seems that he, like White, the respondent, was considerably involved in the business affairs of A. Morse & Co., and he, doubt-

Morse v. Brockett.

less, anticipated some advantage to himself from the arrangement, or some advantage from it to others whom he wished to serve. On the other hand, why should Samuel White discharge a judgment, which was his abundant security, unless he could be protected by some new agreement, in effect like that which he insists was made, and which he supports by direct proof? The question, however, is not whether the alleged agreement was injurious or advantageous to one or the other of the parties — not whether it was a wise or an unwise one, but, was it in fact made? The evidence is to the effect that it was considered and adopted, as the referee has certified; and we must now accept his findings as the truth of the case.

It must then be assumed that Ellis Morse agreed, on good consideration, to pay, take up and discharge, to the amount of \$20,000, the liabilities of Samuel White, as indorser or surety for Alexander White and Alpheus Morse, or the firm of which they and Brown were members. This, it seems, he neglected to do in full. He took up some of those liabilities and became the assignee and owner of the three judgments recovered on similar paper, all, however, falling short of the \$20,000 he had agreed to satisfy. The question now is, could he in his lifetime, or can his personal representative now, enforce collection against Samuel White of those demands? Most clearly not. He had in effect, and in so far as White was concerned, assumed their payment himself; and it matters not that in form he took an assignment of the judgments. As to White he became the principal debtor on those demands, to the extent of \$20,000. Having agreed with White to satisfy them, he could not take them to himself by assignment, and enforce them against his promise. So I agree with the learned referee that Samuel White was entitled to the benefit of performance by Ellis Morse of his agreement, and to be relieved from liability to the extent of such perform-

Morse v. Brockett.

ance. True, those particular demands in judgment were not specified by dates and amounts, as those which Morse was to take up; nor were any of the many demands which should make up the \$20,000, covered by his agreement, particularized. But they came within the general description employed by the parties to show his obligation; and the fact that they were then in judgment, and owned by Morse, and that he immediately paid other claims similarly situated, never made any attempt to enforce them during his life, although he lived ten years thereafter, and that they were omitted from the schedule of claims secured by the \$22,000 mortgage; and the further fact that he asserted that he had no other claim against any of the White family except the \$10,000 mortgage, and that the aggregate amount paid by him on paper he agreed to take up, including these demands, fell short of \$20,000, will support the conclusion that the demands in judgment, now sought to be enforced by his personal representative, were intended by the parties to be satisfied according to the agreement, and, as the referee has found, were in fact taken up by Morse pursuant thereto. In this view of the case, the judgment directed and entered in each of the first two above entitled actions should be affirmed; unless, indeed, some error exists in the admission or rejection of evidence. This subject will be hereafter examined. There are other grounds of support for those judgments urged upon our consideration by the learned counsel for the respondent; but the above conclusion renders their examination unnecessary.

In the third action above entitled, the relation of the parties before the court on the appeal is, that of first and second incumbrancer by mortgage upon the same property; and it is claimed by White, the plaintiff in that action, that Morse's prior mortgage has no force as against his junior mortgage, except to the extent that

Morse v. Brockett.

Morse, the mortgagee, performed the agreement under which the mortgage was given.

Both securities were given pursuant to one and the same arrangement. No money passed between the parties at the times they were made and delivered ; and the consideration of the \$10,000 mortgage was the agreement by Morse, the mortgagee, with White, on good consideration, that he would advance money and take up — or, which is the same thing — take up and satisfy certain outstanding demands on which White was liable, to the extent of \$20,000. Now it seems plain that Morse could not (nor can his personal representative now) enforce this mortgage to the detriment or injury of White, except to the extent that he had performed the agreement which constituted its consideration and gave it validity. Giving him the full benefit of his part performance, and his advances fall short of the amount agreed upon in the sum of \$3,294.20. It was in this view of the case that the learned referee held that, as against White, the mortgage should be reduced by a deduction of this amount. I am of the opinion that the referee was right in this decision. He gave Morse the benefit of all advances or payments made by him under the agreement, and held the mortgage good to the extent that he had performed. This is not a case where damages are to be allowed for a breach of an agreement. The question is, to what extent was the mortgage a lien on the premises covered by it, under the agreement which constituted its consideration. Not having made the advances or payments to the extent, and as the mortgagee had agreed, the instrument was without consideration as to the deficiency or money withheld by him, here found to be the sum of \$3,294.20. To the extent of this deficiency the mortgage constitutes no lien, and the deduction directed by the referee was properly ordered.

I am of the opinion that the finding, that the whole

Morse v. Brockett.

amount of paper taken up by Morse, in pursuance and performance of his agreement, including the three judgments specified in the first two above entitled actions, computed to June 1st, 1857, was, as stated, the sum of \$16,705.80. As regards the so-called "Baker" judgment, it sufficiently appears that it had been arranged and was deemed by the parties paid, even if not technically satisfied, prior to the June agreement. Drafts had been received and accepted therefor; and the sheriff returned the execution "Satisfied in full, April 16, 1857."

Without here pointing out or collating the evidence, I am satisfied, on a careful examination of it, that the referee has allowed to Morse all he paid or advanced pursuant to the agreement on which the parties acted, and on the faith of which White discharged his judgment; nor does it matter, in so far as White is concerned, whether other securities were or were not given Morse by other parties, if it be true that White fully performed the agreement on his part according to its terms. It may be that the arrangement was in some respects changed or modified by and between some of the parties affected by it, other than White; or that Morse waived entire performance on the part of others. All this, if in fact done, would not disturb White's rights—he having no connection therewith. There is some evidence which tends, perhaps, to indicate a change or waiver to some extent of the arrangement as between Morse and the other parties, but none that I have observed showing other than full performance on the part of White as he originally agreed; and it may be that Morse had rights under his mortgage as against other parties, resulting from a change or modification agreed upon with them, but we are here examining the case only as between Morse's personal representative and Samuel White.

There is no error in the admission or rejection of evidence, calling for a reversal of the judgments or of either

Morse v. Brockett.

of them. In regard to some of the objections, it may be answered that they were general, merely, without any specifications of the grounds relied on to give them support. In those instances, and where the objection might have been obviated if suggested, the exception is unavailing.

Nor was any evidence admitted against objection and exception which should have been excluded under section 399 of the Code, in so far as I am able to determine. In some instances no exception was interposed to the disposition of the objection by the referee. The ruling was "evidence taken subject to objection;" in which ruling, for aught that appears, the party objecting acquiesced; and ultimately the referee held and decided that all the testimony given by any of the parties to the several suits, in respect to any transaction or communication had by such party with Morse, the intestate, was inadmissible, and was to be deemed stricken out of the case in which such testimony was taken.

I am unable to discover anything in the additional findings of the referee certified by him on the settlement of the case and exceptions, or in his refusals to find as requested, affecting the merits. The general findings are there substantially repeated, with some additional facts entirely in harmony with them; and the refusals to find as requested afford no ground of error, inasmuch as they were either unnecessary and immaterial, or not supported by proof.

The above considerations, it is believed, dispose of all the questions necessary to the determination of the appeals in these actions, and lead to an affirmance of the judgments.

It has not been found necessary to cite authorities, or even here to refer by way of particular notice and comment to the many cases cited in the elaborate and able briefs submitted by the learned counsel who argued the appeals.

 Smith v. Sergeant.

The difficulties in the case have arisen mainly, if not entirely, out of a disagreement as to the facts.

If the facts certified by the referee be well found, the case is relieved, as it seems to me, from all perplexity on the law. An application of the commonest principles of natural justice will then support the judgments.

Judgments affirmed with costs.

[THIRD DEPARTMENT, GENERAL TERM at Albany, June, 1874. *Miller, Boeckes and Boardman*, Justices.]

SMITH, executor, &c., vs. SERGEANT.

Where the plaintiff's case, as stated in the complaint, except the averment of indebtedness, is expressly admitted by the answer, and the matters of defence stated in that pleading are entirely affirmative, the affirmative of the issues between the parties, on the record, is with the defendant.

But if the plaintiff claims and takes the benefit of a ruling in his favor, upon that question, he cannot be heard to complain of it; and the defendant is not injured by it if, notwithstanding such ruling, the verdict is in his favor.

Upon the sale and purchase of a farm, stock and tools, a bond and mortgage were executed by the purchaser for the purchase-money of the farm, and a note was, at the same time, given by him, to the grantor, expressing, on its face, as the consideration thereof, the purchase by him of the grantor's "stock, farming and dairy tools." These papers were executed in pursuance of an oral agreement between the parties. but it did not appear that there was any written contract expressing the terms and conditions of the sale. In an action upon the note; *held*, that it was not erroneous to admit parol evidence of the terms of the sale of the farm and other property.

In an action upon a promissory note given to the plaintiff's intestate, the defence was that it had been assigned to the defendant's wife. *Held*, that there was no error in allowing the defendant to testify that he saw the note in his wife's possession; that not being a personal transaction between the defendant and the intestate, and therefore inadmissible under section 399 of the Code, but a fact with which the intestate had no then present or immediate connection.

Indorsed upon the note in suit was an unexecuted assignment to the defendant's wife. *Held*, that it was erroneous to ask the attorney who drew the papers, whether he supposed the assignment was signed by the payee, at the time;

Smith v. Sergeant.

the subject under examination being whether the note had been transferred by the payee, to the defendant's wife.

After proof had been given of statements of the plaintiff's intestate that he had given the defendant's wife \$500; that he had given her \$500 in the personal property, farming utensils, &c.; that he had given her \$500 in the trade, &c., the plaintiff offered to prove that the personal property sold to the defendant was worth at least \$500 more than the price paid. *Held*, that the evidence was admissible, and was improperly excluded.

The plaintiff offered to prove that the defendant's wife had admitted that the payee had always remained the owner of the note. *Held*, that the evidence was improperly excluded; it not falling within the rule which excludes the declarations of a former holder of a note, in a suit brought by one to whom it has been transferred for value.

That as the defendant claimed the note by a title growing out of his marital rights, as survivor of his wife — claimed title through his wife in a representative capacity — her admissions were competent, as against him.

THIS case comes before the court on exceptions ordered to be heard in the first instance at General Term.

The action was tried before the court and a jury, and a verdict was rendered in favor of the defendant on his counter claim set up in the pleadings.

The plaintiff claimed to recover on a promissory note for \$500, dated December 1st, 1867, made by the defendant, and payable to Henry J. Corbin, the plaintiff's testator, on demand with interest. The consideration of the note, as expressed therein, was the purchase by the defendant from Corbin of his "stock, farming and dairy tools."

Corbin was the father of the defendant's wife; and the defence was, 1st. That the note was given by Corbin to his daughter, the defendant's wife, at or about the time it was made; and, 2d. That it had been satisfied by the giving of another note by the defendant to his wife at the request of Corbin, in its place and stead. There was also a counter claim made by the defendant for board, attendance, &c., furnished by him to Corbin and wife. The jury found in favor of the defendant on all the issues, and assessed the amount due to the de-

Smith v. Sergeant.

fendant, on his counter claim, at \$453.30. Permission was thereupon given the plaintiff to make and serve a case and exceptions, to be heard in the first instance at General Term, and proceedings in the action were stayed until the decision of the court thereon.

On the trial evidence was given by the respective parties bearing on all the issues, and the case was submitted to the jury under instruction from the court, without any exception to the charge; and the case is here for examination on questions of law arising on rulings of the court in the admission and rejection of evidence. Those questions are considered in the following opinion. (*See S. C., reported briefly, 4 Thomp. & C., 684. 2 Hun, 107.*)

H. G. Prindle, for the plaintiff.

Isaac S. Newton, for the defendant.

By the Court, BOCKES, J. The case was unquestionably for the jury on the proof, as there was much evidence bearing on the issues, proper for their consideration. If true, as matter of fact, that the note in suit was given by Corbin to his daughter, the defendant's wife, and was actually delivered to her, and retained by her as her own property, the plaintiff had no right of action upon it, as he made no pretence of title to the note through her; and, moreover, if after the gift, a new note was made and delivered by the defendant to his wife at the request of her father, to supersede and take the place of the note in suit, that would operate as an extinguishment or satisfaction of it. There was evidence given on the trial tending to prove the defence, on which the jury were at liberty to find, as they did, in favor of the defendant on these issues. So, too, there was evidence in support of the counter claim, raising a question for the jury on that branch of the case; and it therefore follows that the defendant is

Smith v. Sergeant.

entitled to judgment on the verdict, in the absence of all error in the admission or rejection of evidence.

The plaintiff's case, as stated in the complaint, except the averment of indebtedness, which was a conclusion of law, was expressly admitted by the defendant's answer, and the matters of defence stated in the pleading were entirely affirmative. Hence the affirmative of the issues between the parties on the record was with the defendant. The learned judge at the circuit held otherwise; but this ruling is here of no importance, inasmuch as the plaintiff cannot be heard to complain, for he claimed and took the benefit of the ruling; and the defendant was not injured by it, as the verdict was in his favor, notwithstanding the supposed advantage afforded the plaintiff thereby.

It is now proposed to examine the case on the exceptions interposed to the admission and rejection of evidence; and, in the first place, I will refer to those rulings as to which I am of the opinion the exceptions were not well taken.

The witness, Babcock, was allowed, against objection, to give parol evidence of the terms of the sale of the farm and other property by Corbin to the defendant, to the extent that such evidence was called for. In this there was no error. It seems that the note in suit was given on the purchase by the defendant of Corbin's farm, stock and farming utensils; and was for the sum agreed upon between the parties as the value of the "*stock, farming and dairy tools*" sold. The witness stated that he was present at the interview between Corbin and the defendant, and was requested to draw up the papers to carry out their agreement; and when about to give the terms of their bargain, the plaintiff's counsel objected to the evidence on the ground that the writing referred to was the best evidence of the contract. But it did not then appear, nor was it afterwards during the trial made to appear, that the parties entered into any written con-

Smith v. Sergeant.

tract, stating the terms and conditions of their agreement. The arrangement between them, for aught that appeared, was consummated without any written agreement, specifying the terms of the sale. The witness was employed by them to prepare the papers, and he drew the deed, bond and mortgage and note. These papers were prepared, executed and delivered pursuant to, and in performance of the *oral* agreement, as the same was stated to the witness; and it may be added that there was no question or controversy as to the terms and conditions of these papers. The deed, and bond and mortgage, were not specifically called for, and the note was present; and there were no other papers, in so far as the evidence makes disclosure, signed by the parties. Thus, it seems, there was no written agreement expressing the terms and conditions of the sale, and the objection that the writing itself was the best evidence of the contract was without ground of support, in point of fact. I do not understand that the lease, under which the defendant had occupied the farm, was the paper referred to as the one which should be produced, for at the time this objection was interposed, that had not been alluded to. Besides, it no where appears that such lease contained the terms of sale of the farm, stock, &c. But had there been a written contract between the parties expressing the terms of their agreement, it would have been quite remote from the issues—too remote to exclude the parol evidence objected to, on the ground urged; and in this view, also, the objection was not well taken. There was no controversy in regard to the origin of the note in suit, nor any as to its consideration, which, as was conceded by all, was correctly stated on its face. The issues related to other matters, to wit, whether the note, after its delivery, was given to and became the property of the defendant's wife; and whether it had been superseded and satisfied by a new note alleged to have been given in its place. Therefore, the terms and conditions of the

Smith v. Sergeant.

purchase and sale of the farm, stock and agricultural implements, were remote from the questions directly on trial, and no harm could result from the ruling complained of. Nor was there error in allowing the defendant to testify that he saw the note in his wife's possession. This was not a personal transaction between the witness and the intestate, and, therefore, as is urged, inadmissible under section 399 of the Code; but it was a fact with which the intestate had no then present or immediate connection. Nor was it error to admit the question put to one of the witnesses, whether he knew of notice of the death of Mr. Corbin being sent to the defendant. This was on cross-examination, and the point of inquiry was to show hostile feeling; hence its admission or rejection was quite in the discretion of the court.

Without referring to other questions of evidence presented by the case, which, as I think, are free from all just ground of criticism, attention will now be given to several rulings which are deemed erroneous.

(1.) Indorsed on the note in suit was an unexecuted assignment to the defendant's wife. This was written by the witness Babcock, who prepared the papers between the parties for execution by them, and, as was claimed by the defendant, it was to have been also signed at the time by the intestate, Corbin. When detailing what occurred between the parties, he was asked, "Did you suppose it (the assignment) was signed by Corbin at the time?" The question was objected to, but was allowed, and he answered, "Yes, sir." Now the subject under examination before the jury was whether the note had been given by Corbin to his daughter, the defendant's wife; and what was said and done by Corbin bearing on this point of inquiry was admissible as evidence. On the part of the plaintiff it was claimed that he, Corbin, never gave the note to his daughter, and that he expressly refused to execute the assignment of

it to her. To strengthen the defendant's position that, although the assignment was not in fact executed, yet it was intended to have been executed by Corbin, and that its execution was then inadvertently omitted, the witness was permitted to say that he supposed it was signed by Corbin at the time. The supposition of the witness should not have been admitted in evidence. His supposition was not a fact by which the rights of Corbin, or of his personal representative, should be to any extent controlled or affected. As before stated, what Corbin said and did, and all he then said or did bearing on the subject of the alleged gift, was competent to be proved; but the supposition of the witness as to what was intended, or as to what was in fact done or omitted, was incompetent; and his answer, therefore, that he supposed that Corbin had signed the transfer of the note to the defendant's wife, was improper, and, I think, may well have impressed the jury to the plaintiff's injury. If so, and this I deem quite probable, it was error.

(2.) Several witnesses on the part of the defendant had testified to statements or admissions by Corbin to the effect that he had given his daughter, the defendant's wife, \$500. In some instances, the admission or statement was that he had given her the note, evidently referring to the note in suit, the consideration of which was stock, &c. In other instances the admission was that he had given her \$500 in the personal property—in the farming utensils, &c.; that he had given her \$500 in the trade. In this condition of the case, the plaintiff offered to prove that the personal property sold by Corbin to the defendant was worth at least \$500 more than the price fixed in the contract of sale; and that the declarations of Corbin, in regard to the transaction, were in reference to this difference in value. The proof so offered was objected to and excluded by the court. In this, I am of the opinion, there was error. The statements of Corbin on the subject of the gift, or many of

Smith v. Sergeant.

them, were open to the explanation offered. Merely showing that the property sold was worth \$500 more than the contract price, would amount to nothing ; and such evidence, standing alone, would be inadmissible. But it would become important when connected with the further proof that the admissions of Corbin, relating to the subject of the gift to the defendant's wife, had reference, and was intended to apply, to such difference. This was the significance and point of the offer, and the evidence so offered was admissible ; whether or not the plaintiff could make the offer good by evidence, is not here an open question. It is the offer itself, in its entirety, that we must here consider. Most clearly, if the plaintiff could show by competent evidence that the statements of Corbin, on which the defence rested to a very considerable extent, related to the difference in value suggested in the offer, and not to the note in suit, the defence would be materially weakened, if not absolutely overcome. Such evidence was offered, and we are not at liberty to say it would not have been furnished.

(3.) The plaintiff offered to prove that Mr. Sergeant admitted that Mr. Corbin had always remained the owner of the note. This evidence was objected to and excluded. The ruling, I think, was erroneous. If admitted, the evidence would have borne on the question whether or not there had been a gift of the note by Mr. Corbin to his daughter, Mrs. Sergeant. The evidence did not fall within the rule which excludes the declarations of a former holder of a note in a suit by one to whom it has been transferred for value.

Here the defendant claimed the note by a title growing out of his marital rights, as survivor of his wife. He claimed title through his wife in a representative capacity — hence his admissions were competent as against him. (1 *John.*, 340. 1 *Barb.*, 230. 7 *Hill*, 361. 8 *N. Y.*, 279, 280. 21 *id.*, 247-249. 1 *Lansing*,

158.) The exclusion of the evidence was, I think, erroneous.

(4.) I am under the impression that some mistake occurred in the settlement of the case at folio 580. As it reads, the defendant was allowed to give evidence of a conversation between himself and the plaintiff's intestate. He was allowed, against objection, to testify to what Corbin stated to him personally. This was inadmissible, under section 399 of the Code. The learned judge was very careful, as the case plainly shows, to exclude all evidence which could be deemed inadmissible under this section, with this single exception. Perhaps a mistake occurred in naming the party who made the observation testified to. The defendant was being interrogated in regard to a conversation between himself and Austin; and the case reads as follows: "Did you state to him (Austin) that they had the note, or anything of that character? A. There was no mention of the note in our conversation. Q. You speak of the \$500? A. He spoke of it in this way, as the \$500. Q. Who did? A. *Mr. Corbin*. Objected to by plaintiff. Objection overruled. Plaintiff excepts." Did not the witness mean Austin instead of Corbin? I am induced to believe that there was some mistake here, for the reason that throughout the entire trial the court was particularly observant of the prohibition contained in the section of the Code alluded to. But we must decide the case as presented; and as presented, the defendant was allowed to give the declarations of the intestate, made to him personally, in evidence in his own behalf. This was error.

For the reasons above given, I am of the opinion that there must be a new trial of the case. As we have seen, improper evidence was admitted against objection, and competent proof was offered which was excluded. How a jury will regard the case when all improper evidence shall be excluded and all competent evidence admitted, or whether, then, it will be found to stand materially

 Chaffee v. Morss.

different from what it now appears, is not matter for the consideration of the court on the present motion.

A new trial must be granted, the costs to abide the event.

MILLER, P. J., concurred.

BOARDMAN, J. I concur, upon the second ground stated, and upon the three other grounds if an objection without any grounds or reason therefor will sustain an exception.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM at Binghamton, September 8, 1874. *Miller, Boockes and Boardman*, Justices.]

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 CHAFFEE vs. MORSS.

Where there is a non-joinder of parties plaintiff, yet if the answer does not set up such non-joinder as a separate and distinct defence, the objection will be deemed to have been waived.

Although an answer be defective in form, yet if the cause is tried, before a jury, without any objection to the pleading on the ground of insufficiency, the objection will be deemed to have been waived; and upon appeal, the case will be examined on the merits of the matters litigated before the jury.

Where the evidence is conflicting it is for the jury, who see the witnesses, hear them testify, and observe their manner of testifying, to settle the questions of fact between the parties. And where the proof is such as to authorize the jury to find for either party, on the disputed questions, accordingly as they shall credit the evidence favorable to one or the other of them, their verdict is conclusive upon the parties.

Where there is sufficient evidence, if adopted as the truth of the case, to vindicate the verdict, the judgment cannot be reversed on the ground that the finding of the jury is unsupported by proof.

APPEAL, by the defendant, from a judgment entered upon the verdict of a jury. (*S. C.*, *briefly reported*, 5 *Hun*, 708.)

Chaffee v. Morse.

J. L. Stewart, for the appellant.

T. F. Bush, for the respondent.

By the Court, BOCKES, J. The plaintiff, by his complaint, claimed to recover against the defendant for cutting 1,690 hemlock logs, at defendant's request, and at the stipulated price of ten cents each.

The defendant, by his answer, denied each and every allegation of the complaint; also set up that the contract for cutting the logs was made with the plaintiff and one John Chaffee, and that it was not performed, to his damage of one hundred dollars; which sum he urged as a counter claim.

The answer does not, in terms and in due form, set up, as a separate and distinct defence, the non-joinder of John, as a party plaintiff; hence, this objection, even if it had foundation in fact, must be deemed to have been waived, (*Code*, sec. 148;) nor was it averred in what respect the contract, alluded to in the pleading, was not performed.

In these respects the answer was defective. But the case seems to have been tried without any objection to the pleading on the ground of insufficiency; therefore it should now be examined on the merits of the matters litigated before the jury.

On the trial, the plaintiff gave evidence, before the jury, to the effect that he, with others under him or in his employ, cut for the defendant 1,690 saw logs, at the stipulated price of ten cents a piece—the logs to be cut clean and to the best advantage—payment to be made July next following. The jury found a verdict for the full amount authorized by this proof.

The evidence on the part of the defendant tended to show that the contract was with the plaintiff and his brother John—that the number of logs cut was 1,627—

Chaffee v. Mors.

that the price was ten cents a piece, or forty dollars a thousand feet at defendant's option—payment to be made the ensuing July, and the cutting was to be clean and to the best advantage. The defendant, and one of his witnesses, stated, in substance, that the improper manner in which the logs were cut, destroyed in a great measure the value of the timber. Other of his witnesses said that it improved their value. This was the substance of the proof on the subject of alleged damage.

On the other hand, and in answer to the proof of the defendant as to the breach, the plaintiff testified to a very considerable experience in cutting logs—that he cut the logs as clean as he well could, and to the best advantage for his employer; and he particularized as to the timber, described its size and quality, and his manner of cutting as regarded crooks in the timber, &c. His evidence tended to show a performance of the contract on his part in all the particulars complained of.

Now, it will be readily seen that here was a conflict of evidence, making it a case for the jury, by whose verdict the parties must be held to be concluded. It was for the jury, who saw the witnesses, heard them testify, and observed their manner of testifying, to settle the questions of fact between the parties. On the proof in this case, the jury were authorized to find for the plaintiff, or for the defendant, on the disputed questions, accordingly as they should credit the evidence favorable to one or the other of the parties. So they were authorized to find as they did, for the plaintiff, and for the amount awarded. They had a right to find that there were 1,690 logs cut, at the agreed price of ten cents each; and accordingly as they should credit the proof before them, they might find that the contract was performed on the part of the plaintiff. It seems that the jury accepted the case as made by the plaintiff and his witnesses. This they had the right to do. Nor is the

Chaffee v. Morsa.

preponderance of proof clearly against the verdict. There is evidence in its support; and it may be said, perhaps, that it is quite as satisfactory in its general tenor and effect as is that submitted on the part of the defence. It is enough, however, that there is abundance of evidence, if adopted as the truth of the case, to vindicate the verdict. Hence, the judgment cannot be reversed on the ground that the finding is unsupported by proof.

A question of evidence remains to be examined. At the close of the trial, the defendant's counsel recalled a witness, and interrogated him as follows: "What was the average number of logs to the thousand feet?" The question was objected to by the plaintiff's counsel and excluded. An exception to the ruling was duly entered.

It is now insisted that an answer to this question would have borne on the point, whether the logs were properly cut. This, I think, is not obvious. The reason why they were not properly cut was, as urged on the trial, that they were not cut with due regard to length, considered with reference to crooks and imperfections in the timber. Therefore, whatever was the average number of logs to a thousand feet, could throw no light on the question whether they were cut to the best advantage. Nor could an answer have aided at all in determining the number of logs actually cut, for there was no proof whatever in the case showing the aggregate number of feet in the entire cutting. Nor could an answer to the question have borne on the subject of payment, which, according to the defendant's statement, was to be estimated at ten cents apiece, or at forty dollars per thousand feet, at his option, inasmuch as he had wholly omitted to make an election; nor did he by his answer claim, or by his proof show, a right then to make a choice.

Miller v. Irish.

I am of the opinion that the record discloses no error calling for a reversal of the judgment.

The judgment should be affirmed with costs.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM at Schenectady, November, 1874,
Miller, Boakes and Boardman, Justices.]

MILLER vs. IRISH & HEUSTED.

In an action to recover brokerage, of vendors, upon the sale of a farm, the defence was that the plaintiff was not employed by the defendants. The evidence as to the fact of employment being conflicting, testimony was offered by the defendants, going to show that the plaintiff was, in point of fact, in the employment of the purchaser, or acting in his behalf and interest. *Held*, that the evidence was properly admitted.

And there being a question both as to the fact of the plaintiff's employment by the defendants, and as to its extent; *held*, that evidence of all that he said and did, bearing on the subject of his services at and during the time he assumed to act in aid and furtherance of the object sought to be attained, was competent to be proved.

That the defendants had a right to show what he did, and all he did, on the subject of the sale, to the delivery of the deed. But that if the plaintiff had earned his commissions when the contract was signed and delivered, evidence of his subsequent conduct in the matter was inadmissible.

Held, further, that if employed simply to obtain a purchaser, the plaintiff's commissions were earned when he produced a satisfactory buyer; but he was bound to show an employment, and the extent of it, and that he had performed the undertaking assumed in the contract with his principals.

THIS action was brought to recover brokerage for procuring the sale of a farm owned by the defendants in trust, and for drawing the papers connected with the sale. The cause was tried before Justice HOGGBOOM and a jury. The jury found against the claim for brokerage, but gave a verdict of \$5.32 in favor of the plaintiff, for drawing the papers. A motion was made by the plaintiff for a new trial, on the minutes of the court, which was denied. Judgment was entered in favor of the defendants for costs of the action, less the

Miller v. Irish.

amount of the verdict; whereupon the plaintiff appealed both from the order denying a new trial on the minutes and from the judgment. The questions arising on the appeals appear in the following opinion. (S. C., briefly reported, 5 *Thomp. & C.*, 707; 3 *Hun*, 352.)

Mr. Beach, for the plaintiff.

Mr. Gaul, for the defendants.

By the Court, BOCKES, J. The question litigated on the trial was whether the plaintiff was employed by the defendants to perform services as broker, for which compensation was claimed. The plaintiff and the defendants were examined as witnesses, before the jury. The former asserted the employment and the latter denied it. Evidence was also given on behalf of both parties, by other witnesses, tending to sustain their positions respectively; and the question of fact was submitted to the jury. The jury, on consideration of all the evidence, found against the plaintiff on this question. It cannot be disputed that the case was a proper one for the jury on the proof; and no exception was taken to the manner of its submission by the court. Hence it follows that the only questions before the court on the appeals are in regard to the admission and rejection of evidence.

As above indicated, the evidence was conflicting; on the part of the plaintiff tending to establish the fact of the plaintiff's employment, and on the part of the defendants to show the contrary. In this condition of the case evidence was offered by the defendants, going to show that the plaintiff was in point of fact under the employment of the purchaser, or acting in his behalf and in his interest, which, as was claimed, would tend to support the defendant's assertion that he was not in their employ. The evidence was admitted against the plaintiff's objection. In this there was no error. The

Miller v. Irish.

tendency of such evidence would be against the assertion of his employment, as it would not be presumed, in the absence of all explanation or excuse, that a person was under the employment of a party when acting in hostility to his interest. The question of the plaintiff's employment was in doubt; hence any evidence bearing on it was admissible. The point of objection, however, is, that this evidence related to occurrences subsequent to the full performance of his contract as broker—at a period when he was under no obligation whatever to the defendants—to occasions after his brokerage was earned. But there was a question here as to the extent of his obligation to the defendant. The plaintiff asserted in his complaint that he was employed “to find a purchaser for, or to negotiate a sale” of, the farm—that he did this—that a contract of sale was entered into with the purchaser—that in pursuance thereof, the sale was consummated by the execution of a deed to the latter, who paid the purchase price in part, and secured the balance by bond and mortgage; all which, as was alleged, was done in fulfilment of and in accordance with the provisions of the contract, procured and negotiated by him. He further averred that he drew the papers at the instance of the defendant; also that the fair “*value of said services*” was two and one-half per cent. on the contract price, for which amount he claimed judgment. In support of these averments he testified to his employment; put in evidence the contract; stated that he drew this, and subsequently the deed and the bond and mortgage therein provided for; also testified to meetings with the parties to the contract with a view to the carrying of it into effect. The contract provided for a survey of the farm, at the purchaser's option; and the sale was to be, in case of survey, \$85 per acre. It appeared that a survey was had, the plaintiff attending and assisting. Now it will be seen that here was a question, both as to

Miller v. Irish.

the alleged employment, and also as to its extent; whether if there was an employment, it did not embrace all the plaintiff did or assumed to do in regard to the sale, to the time of the delivery of the deed. The extent of his obligation and duty under the alleged contract being an open question, evidence of all that he said and did bearing on the subject of his services at and during the time he assumed to act in aid and furtherance of the object the parties were seeking to attain, was competent to be proved. The defendants had a right to show what he did, and all he did, under the circumstances of this investigation, bearing on the subject of the sale, to the delivery of the deed. If under duty to the defendants, he was bound to act faithfully in their interest. Evidence that he did not so act, would tend to show that he was not in their employ; or would bear on an equally pertinent fact, that he had forfeited his right to compensation by unfaithfulness to his employers. It is true, if the plaintiff had earned his commissions when the contract was signed and delivered, the evidence relating to his subsequent conduct in the matter was inadmissible. If employed simply to obtain a purchaser, his commissions were earned when he produced a satisfactory buyer. (41 *N. Y.*, 477. 51 *N. Y.*, 124. 3 *Keyes*, 203. 38 *N. Y.*, 212.) But he was bound to show an employment, (55 *N. Y.*, 319,) and the extent of it; and that he had performed the undertaking assumed in the contract with his principal. (31 *N. Y.*, 462.) It was a question in this case, whether there was any employment, giving the plaintiff a right to demand brokerage; and if there was such employment, then what services were embraced in it, and whether he had faithfully supported the interests of his employers according to the obligations he had assumed. The evidence objected to, but admitted, and above alluded to, bore on some one or more of these subjects of inquiry, hence was admissible.

Miller v. Irish.

The exclusion of the evidence that Van Ness made a survey of the land at the time of the sale by Ludington to Wild, also that he knew where the line was between Ludington and Wild, and that he made his survey of the farm according to that line, was proper. In so far as can be seen, this evidence was wholly immaterial and irrelevant.

After the plaintiff had made his claim for brokerage, and the defendants had refused payment, it seems that the defendants, doubtless with a view to avoid trouble, offered the plaintiff thirty dollars for his services, which was rejected. This evidence was received against the plaintiff's objection. The money was not offered, as it seems, in payment of the claim for brokerage. The question was as follows: "Repeat about this tender * * * for *drawing the papers* in this case." The witness answered: "At the time of drawing the deed he refused to take payment, for the reason that he considered that we were under obligation to pay him, and wanted to make it appear so. I got some greenbacks and took a man with me * * * I told Miller that I wished to settle with him for *drawing the article of agreement and the deed*, &c. ; I took out the money and laid it down—\$30; he did not look at it at all, but said, 'I shall not take it.' " It is not obvious how this evidence could, by any possibility, work any harm to the plaintiff. But it is plain that it did not, in point of fact. The offer pertained to the drawing of the papers, and for that service the jury rendered a satisfactory verdict. This evidence could have no bearing on the subject of the plaintiff's right to a percentage on the amount of the sale. The admission of that evidence affords no ground of error calling for a new trial.

After a careful examination of the case, I am of the opinion that the order denying a new trial on the minutes, and the judgment entered on the verdict, should be affirmed.

 Excelsior Petroleum Company v. Embury.

Order and judgment appealed from affirmed with costs. (a)

[THIRD DEPARTMENT, GENERAL TERM at Albany, December 31, 1874.
Bockes, Landon and Countryman, Justices.]

(a) Affirmed by Court of Appeals. (63 N. Y. 652.)

THE EXCELSIOR PETROLEUM COMPANY vs. AUGUSTUS EMBURY and others.

The defendants, who were trustees of a manufacturing corporation organized under the act of 1848, (*Laws of 1848, ch. 40.*) and the acts amending the same, were charged with a violation of section two of chapter eighteen, title four of the first part of the Revised Statutes, (*vol. 1, p. 1175, 4th ed.*) in having paid dividends not from the surplus profits of the plaintiff, but by withdrawing and dividing a part of the capital stock without the consent of the legislature. *Held*, that the two statutes were repugnant to, and in conflict with, each other; and that it was not the meaning or object of the law-makers to apply both statutes to trustees of a corporation created under the act of 1848. *Held*, also, that the legislature designed to provide, by the act of 1848, itself, for the cases in which individual liability should result from the acts prohibited.

Accordingly, *held*, that an action could not be maintained against the defendants, as trustees, under the provisions of the Revised Statutes.

A subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one, yet if the latest statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act.

A subsequent statute, making a different provision on the same subject, is not to be construed as an explanatory act, but as an implied repeal of the former.

The cases of *Bowen v. Lease*, (5 *Hill*, 221;) *Robinson v. Bank of Utica*, (21 *N. Y.*, 406;) *Sibell v. Remsen*, (33 *N. Y.*, 95;) and *Harris v. Thompson*, (15 *Barb.*, 62,) commented on and distinguished.

A PPEAL, by the plaintiff, from a judgment entered upon the report of a referee.

W. H. Dickinson, for the plaintiff.

Excelsior Petroleum Company v Embury.

John E. Parsons, B. T. Kissam, Geo. C. Blanke, and G. P. Andrews, for the defendants.

By the Court, BRADY, J. The defendants in this action are charged with a violation of the provisions of the second section of the eighteenth chapter (title four) of the first part of the Revised Statutes (*vol. 1, [4th ed.,] 1175,*) in having paid dividends not from the surplus profits of the plaintiff, but by withdrawing and dividing a part of the capital stock without the consent of the legislature.

They were the trustees of a manufacturing corporation organized under the act of 1848 and those amendatory thereof; and the question presented *in limine* is, whether the statute mentioned applies to them. The thirteenth section of the act of 1848 provides as follows: "If the trustees of any such company shall declare and pay any dividend when the company is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted while they shall respectively continue in office; provided that if any of the trustees shall object to the declaring of such dividend or to the payment of the same, and shall at any time before the time fixed for the payment thereof file a certificate of their objection in writing with the clerk of the company and with the clerk of the county, they shall be exempt from the said liability."

And the twenty-sixth section declares that every corporation created under the act shall possess all the general powers and privileges, and be subject to the liabilities and restrictions, contained in title third, chapter eighteen, of the first part of the Revised Statutes; and that the provisions of section six, of article two, chapter thirteen, of part first of the statutes, shall ap-

Excelsior Petroleum Company v. Embury.

ply to every such corporation. The second section of the Revised Statutes, and the thirteenth section of the act of 1848, each impose a penalty for the violations of its provisions in reference to the appropriation of capital to the payment of dividends, and each penalty differs from the other. By the former the directors under whose administration the same may happen, except those who may have caused their dissent therefrom to be entered at large on the minutes of said directors at the time, or were not present when the same happened, shall in their joint and several capacities jointly and severally be liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full amount of its capital stock so divided, withdrawn, paid out or reduced; and by the latter the trustees shall be jointly and severally liable for all the debts of that company then existing, and for all that shall be thereafter contracted while they shall respectively continue in office. The mode, too, in which the director and trustee may relieve himself of responsibility is entirely different. The former accomplishes it, if present, by causing his dissent therefrom to be entered at large on the minutes, and the latter by filing at any time before the time fixed for the payment of the same a certificate in writing of his objection with the clerk of the company and also with the clerk of the county. It will also be perceived that the director is exempted from liability if he be not present when the dividend is declared, while the trustee is not thus favored, and must see to it that he file the contemplated objection in writing; and it would seem that he may do so even though he was present and participated in the declaration. The analogy between the provisions of these sections indicates very plainly that the legislature adapted the section of the Revised Statutes—*mutatis mutandis*—to the companies to be formed under the act of 1848, and intended that the provisions of section thirteen, by which that was accom-

Excelsior Petroleum Company v. Embury.

plished, should be applicable to them. This is apparent not only from the general structure of the section, but from the declaration made, in section twenty-six, of the parts of chapter 18 of the Revised Statutes to which such companies should be subject. The legislature substantially designed to provide by the act itself for the cases in which individual liability should result from the acts prohibited. (*Rochester v. Barnes*, 26 Barb., 657.) There is, however, another reason why this action cannot be maintained. The two statutes are repugnant to each other. It was not the meaning or object of the law-makers to apply both of these statutes to trustees of a corporation created under the laws of 1848, as already suggested; and hence the provisions are in conflict with and repugnant to each other. They are not the same in the penalty imposed, the manner in which it may be incurred or absolved, or as to the time when the liability may be enforced. Under the Revised Statutes the directors are liable to the creditors, in the event of the dissolution of the corporation, to the full amount of the capital stock divided or withdrawn. Under the act of 1848, the trustees are liable for the debts then existing, and may be at once prosecuted.

There is no restriction on that subject. A subsequent statute which is clearly repugnant to a prior one necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one—yet if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act. (*Sedg. on Stat. and Const. Law*, 124. *Rochester v. Barnes*, *supra*, and cases cited.) A subsequent statute, making a different provision on the same subject, is not to be construed as an explanatory act, but an implied repeal of the former. (*Dash v. Van Kleeck*, 7 John. 477. *Columbian Manuf'g Co. v. Vanderpoel*, 4 Cowen, 556.) Inconsistent provisions incom-

Excelsior Petroleum Company v. Embury.

patible with each other are thus repealed, leaving the former law in full force and effect in all other respects. (*Livingston v. Harris*, 11 *Wend.*, 329. *Harrington v. Trustees of Rochester*, 10 *Wend.*, 547.)

The referee expressed an opinion favorable to the maintenance of this action, feeling bound by the decision in the case of *Bowen v. Lease*, (5 *Hill*, 221.) The question considered in that case was whether the New York and Erie Railroad Company was subject to the provisions of the Revised Statutes, under which this action was brought, in relation to an assignment in contemplation of insolvency. It is not in point here, because in the act incorporating that company there was no special provision on the subject of assignments.

The same may be said of the act of 1848. The proposition sought to be established is that in the act of 1848 there is no special provision in reference to assignments in contemplation of insolvency, while on the subject of improper dividends there is, and that element makes the case mentioned inapplicable here.

The case of *Robinson v. The Bank of Utica*, (21 *N. Y.* 406,) on which the appellant relies, was one against a banking corporation, and it was held that the provisions of the Revised Statutes relating to assignments made in contemplation of insolvency applied to it. It was organized under the general banking law of 1838, which contained no provision on the subject of such assignments. There were no conflicting statutes, therefore, to be considered and passed upon. The case of *Sibell v. Remsen* (33 *N. Y.*, 95) is also one involving the same subject. The Forest Agricultural Steam Engine Co. formed under the general law of 1848, (*supra*,) made an assignment in contemplation of insolvency. The instrument was declared void. It has already been stated that there is no provision in reference to such papers in the act of 1848; and there is no doubt that the pro-

Excelsior Petroleum Company v. Embury.

visions of the Revised Statutes apply, on the authorities and on general principles.

The case of *Harris v. Thompson* (15 Barb., 62) was also an adjudication upon an assignment in contemplation of insolvency. None of these cases touch the question considered, therefore. The statute of 1848, (*supra*,) in regard to the appropriation of capital in the payment of dividends, creates a new order of things, applicable to companies formed under it, declaring, as we have seen, the act which shall create liability — the extent of the obligation and to whom payable, and the manner of avoiding its burdens. If the several provisions of the Revised Statutes and the act of 1848 stand thus, the trustees must, in order to avoid responsibility, which is a right secured, do what is required on that subject by both statutes, and they are each entirely different from the other. This question has been discussed on the proposition that the defendants, assuming them to have been trustees and to have participated in the acts complained of, really appropriated the capital, and in that way violated the law. If the duty devolved upon this court, in this action, to consider that question, it is not improbable that the views of the referee might be sustained. The subjects embraced in the purpose for which the plaintiffs were organized were of a peculiar and extraordinary character, and about which, on the questions of value, there was, as the evidence, perhaps, shows, little difference of opinion at the time the dividends were declared. It would not be difficult to demonstrate that when the dividends were made, accepting the estimates of value given as reliable, it would seem the capital of the company was intact. It is not designed here, however, to approve directly or indirectly of the use of the capital stock of a company, or any part of it, for the payment of dividends or any other purpose unless expressed and authorized by statute. The safety of the creditor, the stability and usefulness of the company,

 White v. Fuller.

and the protection to which the community invited to buy its stock is entitled, all demand that dividends should be paid out of surplus profits — not those which by a lively imagination may be figured out by an array of magnificent numbers, but which in fact exists and can be shown on such examination as an honest and faithful public officer, charged with the duty, would make of the affairs of a company. It is not designed here to state, either, what would positively be the legal result, if the value left the capital apparently intact; but to suggest, merely, that as the plaintiff's case rested upon an alleged difference in values when the dividends were made, the answer to the charge, as matter of fact, was successful, if there was evidence to show that the difference did not in fact exist, although there might be a conflict of testimony on the subject. The judgment must, however, upon the question discussed, be affirmed with costs. (a)

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hun*, 648. See 63 *N. Y.*, 422, where it seems the principle of above decision is affirmed.

 • • •

JOHN WHITE and others vs. JACKSON C. FULLER.

Where a miner of coal had permitted a coal commission firm to hold themselves out as agents for the sale of coal for him, and had consummated sales on credit, made by them; *held*, that he would be bound to a third party by a contract for the sale of coal on credit, made for future delivery by such agents; notwithstanding he had privately forbidden them to sell on credit or for future delivery.

But when there is a custom of the trade that an agent for the sale of coal has no right, unless specially authorized, to make a time contract extending over a long period, persons dealing with an agent are bound by such custom; and

White v. Fuller.

a principal will not be liable upon such a time contract, made by an agent without special authority.

The agent of a coal miner, without authority, contracted to sell coal for future delivery, at a specified price. As soon as the principal was informed of the contract he notified the purchaser that he repudiated the same. At that time the market price of coal was as low as the contract price, and the purchaser might have bought the same quantity of coal at the same price. *Held*, that the purchaser was not entitled to damages for the failure to fulfil the contract; even if the agent had acted with authority.

The applicability of an abstract proposition to a case is a matter of judicial cognizance; and the refusal to charge requests, after all that a party is entitled to, upon the evidence, has been charged, is not error.

Although there be a change of relations between principal and agent, by which the latter, who was previously authorized to sell on credit, is positively prohibited to sell on credit, in future, such change of relations will not affect the rights of third persons who have dealt with the agent, as such, and with the knowledge of the principal. Such persons are entitled to notice of the change.

It is a well settled rule of law that a principal, as to third persons, is bound by contracts made on his behalf by one who holds himself out to be such agent, although in fact he is not, if the principal know of such assumption of authority, and permits it, without taking the steps to prevent its exercise to another's prejudice. *Per* BRADY, J.

A PPEAL, by the plaintiffs, from a judgment in favor of the defendant entered upon the verdict of a jury.

The action was brought to recover damages for the alleged breach of a contract to deliver 6,000 tons of coal. The defendant was, in 1868, the operator of a coal mine, in Pennsylvania, and the firm of Chamberlain & Co. were commission coal merchants, in the city of New York. Upon the application of Chamberlain the defendant sent to the firm coal to sell on commission. The firm held themselves out as the sole agents in New York city for the sale of the defendant's coal. In May, 1868, on two occasions, the plaintiffs purchased some of the defendant's coal of Chamberlain & Co., giving their notes for the same, payable to the defendant's order. These notes were indorsed by the defendant, and paid. In August, 1868, the plaintiff entered into a contract in writing for the coal in question, with the firm, who exe-

cuted the same claiming to be agents for the defendant. In the latter part of that month, the defendant, being informed of the contract, gave notice that Chamberlain & Co. had no authority to make it, and refused to carry it out. The facts appear sufficiently in the opinion.

W. W. Goodrich, for the appellants.

Joseph A. Welch and *A. J. Vanderpoel*, for the respondent.

By the Court, BRADY, J. The plaintiffs purchased a quantity of coal from the defendant by a contract therefor, made with Chamberlain & Co., whom they claim to have been the defendant's agents, and fully authorized to make the sale. The testimony bearing upon the relations between Chamberlain & Co. and the defendant, as between themselves, is conflicting, the former stating facts and circumstances tending to prove the agency, and the latter, by facts, circumstances and denials of material statements, demonstrating that the alleged agency did not exist.

So far as the plaintiffs are concerned, the agency of Chamberlain & Co. depends upon their statements relating thereto, and by inference from transactions taken in connection with the circumstances attending the publication of a circular by Chamberlain & Co., claiming to be sole agents of the defendant. The transactions are purchases of coal from Chamberlain & Co. by them, which was sent from the defendant's mines, and for which he received payment through Chamberlain & Co.

The evidence is so conclusive, however, in favor of the defendant, on this question, that if the action were between him and Chamberlain & Co., the result must be in his favor. The letter of June 25, 1868, written to them by the defendant, and which was prior to the sale to the plaintiffs, is a positive prohibition against selling

White v. Fuller.

coal on credit, and was a termination of an agency for any other than a sale for cash; even if such an agency had previously existed.

It does not follow, however, that the relations thus changed affect the rights of third persons who have dealt with the agent as such, and with the knowledge of the principal. Such persons are entitled to notice of the change. The rule is a familiar one, and was substantially charged when the cause was submitted to the jury, by the justice presiding.

The previous transactions by the plaintiffs were coupled with information of the circular, in which the firm of Chamberlain & Co. announced themselves as the sole agents for the sale of the defendant's coal in this city — a circular which had been sent to the defendant, and was received by him and its receipt acknowledged. There was also proof that the circular was posted in his office at the mines, and he did not deny positively that such was the fact; nor does any witness called by him, except so far as it may be accomplished by a statement that the witness did not see it there.

It is not necessary to say, perhaps, that it is a well settled rule of law that a principal, as to third persons, is bound by contracts made on his behalf by one who holds himself out to be such agent, although in fact he is not, if the principal know of such assumption of authority, and permits it without taking the means to prevent its exercise to another's prejudice.

It is equal, quite so, to the ratification of an unauthorized act, if it be not superior, as evidence of original power. The plaintiffs had the right to rely on the fair inferences and just conclusions to be drawn from the circulars issued by Chamberlain & Co.; the knowledge of their issue and transactions, that is, purchases of the subject-matter of the agency from Chamberlain & Co., and their consummation by the defendant. Upon these elements there was scarcely any conflict, if indeed there

was any collision between the witnesses called in reference to them.

If, therefore, the case rested upon this issue, the duty of this court to the plaintiffs would be clear; but there is another and a controlling element to be considered. It is this. The defendant offered evidence to show that by a custom existing in reference to agencies for coal, the agent had not, except by special authority therefor, the right to make a time contract such as was made with the plaintiffs, that is, for the delivery of coal extending over a period of months; and this evidence was not met by the plaintiffs and overcome.

It may be said, perhaps, with propriety, that it was not at all contradicted, so slight is the answer made to it. This custom prevailing, the plaintiffs must be presumed to have dealt with reference to it. At least, existing in the trade, they are chargeable with notice of it. As is said by WRIGHT, J., in *Easton v. Clark*, (35 N. Y., 232:) "The purchaser is bound to take notice whether the agent is departing from the usage of trade." "He is presumed to understand the restrictions and limitations imposed by the usage of trade upon a general agency, (*Story on Agency*, §§ 224, 225;) and when, in making a sale, the agent has departed therefrom the principal may repudiate the act." It was the duty of the plaintiffs, or incumbent upon them, to have ascertained whether or not the firm of Chamberlain & Co. had the special power to make the sale on time, which they did make—a fact which, it seems, they took no measures to determine. There is no pretence that they did. An examination of the charge shows that the case was submitted to the jury on the various phases of the law of principal and agent, and the rights and obligations of third persons which it was necessary should be explained to them, and that relating to the custom as well.

White v. Fuller.

The jury having found for the defendant, we may assume that they considered him bound by the contracts of Chamberlain & Co. as his agents, acting within the scope of their authority, but that in regard to the plaintiffs' contract, they were acting without power to represent him, and that the plaintiffs were put upon notice of the application to it of the existing custom by the nature of the sale made. This conclusion justifies the verdict given on the issues created by the pleadings and evidence.

There is still another difficulty in the way of the plaintiffs' success in this action. The proof shows that the defendant, prior to the first of September, 1868, advised the plaintiffs, through Chamberlain, that he would not perform the contract.

Chamberlain testified that he told the plaintiffs that the defendant refused to sell the coal. The evidence also shows that at the time this communication was made there had been no rise in the price of coal. The plaintiffs could have purchased, therefore, at the same rates from others. This notice enabled them to protect themselves by another purchase, and they could not, on the authorities, relating to the subject, await the coming of events. It was incumbent on them to act, there being a reasonable time within which they might have bought the coal; and not having done so, they could not recover any damages resulting from their own inactivity. The law does not encourage demands thus arising. (*Hamilton v. McPherson*, 28 N. Y., 72. *Baker v. Drake*, 53 *id.*, 211. *Dillon v. Anderson*, 43 *id.*, 231. *Worth v. Edmonds*, 52 Barb., 40.)

The exceptions taken by the plaintiffs are valueless. The defendant had the right to show that in point of fact the firm of Chamberlain & Co. were not his agents, and to unite with it such evidence as he might have, to overcome the presumption arising from the facts and

circumstances out of which the plaintiffs essayed to establish the fact that they were. The defendant had the right thus to contradict the evidence of the witness Chamberlain, by whose statements as a witness, the plaintiffs sought to prove the existence of an agency in fact. The denial of the agency was the underlying element of the defence, and the testimony to show that it was never created by arrangement between the defendant and Chamberlain & Co. was clearly competent.

The exclusion of the question put to Chamberlain, "In what capacity did you execute this contract with White, Fowler & Snow?" was proper. It was not for the witness to determine. It was for the court and jury, either or both, as the facts and circumstances required.

The requests to charge, which were not warranted by the testimony in the unqualified form in which they were made, were properly refused. The subjects embraced in them had been charged, but in connection with the proof given and to which they were necessarily subject in their application to the questions at issue.

It is not difficult to prepare in a controversy like this with involved questions a series of abstract requests, but their applicability to the case is a matter for judicial cognizance. It often happens that they are too unconditional for unqualified, absolute application. Such was the distinguishing trait of those refused in this case. It is a familiar rule that the proposition contained in a request must be in substance one which is properly evoked by the facts and circumstances proved, or the court is not bound to regard it. The charge as delivered contained, as before suggested, all the plaintiffs were entitled to according to the proofs and the issues, and the refusal of the court to grant further requests was just and proper.

The request to charge the jury that they would have the right to consider the first contract, in determining

White v. Fuller.

the question as to whether the contract finally made was intended by the parties to be the contract of the defendant, was, in the view we take of this controversy, of no importance. The first contract was, in effect, a memorandum one only, and was abrogated by the second, which contained the agreement between the parties in full. The question whether the parties to it intended it to be the contract of the defendant was not at all in doubt. It was conceded that they did so intend, and it was wholly immaterial whether they did or not. The issues were whether Chamberlain & Co. of the one part were authorized to make any contract for the defendant, and, if yea, whether as to time contracts the plaintiffs were not bound by the custom on that subject. The refusal to grant the request was for this reason properly made.

There are other exceptions in the case which have not been particularly referred to here, but they are of no importance. They do not in any way affect or control the principles of law on which this appeal depends, and the matters to which they relate are not material elements in regard to such principles, or their application herein. They have no value, and it is deemed sufficient, therefore, to dispose of them in this general way. The plaintiffs' case seems to have been conducted, if we are to judge of it by the exceptions to evidence, on the theory that the defendant could scarcely answer successfully, without meeting its obligations, a contract made between the plaintiffs and him through the intervening agency of a person apparently authorized to act as such; and although there is much force in the position, a defendant may nevertheless be able to overcome it by proof of facts and circumstances warranted by the rules of law and evidence.

In this case the proof of custom was sufficient for the purpose, aside from that given, to put the plaintiffs in such legal relation to him by his notice that he would

Mayor &c. of New York v. Genet.

not fulfil the contract, as to render them powerless in the premises.

The judgment should be affirmed with costs.(a)

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported briefly, 4 *Hm*, 681.

THE MAYOR &c. OF THE CITY OF NEW YORK vs.
HENRY W. GENET.

A complaint alleged that the defendant had drawn and received from the comptroller of the city of New York a very much larger sum than was due for services, labor and materials necessary for, and which had been rendered and furnished in and about the construction and erection of a court house. The answer denied this allegation. *Held*, that an issue was thus presented which would probably involve the items of the accounts for labor and materials expended and used in the erection of said building; and hence the action was one which the court was fully authorized to refer, under section 271 of the Code.

Held, also, that although the action was not upon an account, yet the trial of the issue would involve "the examination of a long account," which made the cause a referable one.

The Code, however, does not *require* such an action to be referred. The court may try it, if it pleases, and a trial without the reference is not erroneous.

The issue in a cause was joined in July, 1874. It was upon the calendar of the Circuit Court, for trial, in December, 1874. The defendant, instead of moving that court, before the judge holding such circuit, moved, in another branch of the same court, before another judge, to take the cause from the trial court and send it to a referee. And this motion was delayed until after preparation for the trial had been made, and the plaintiffs were presumably ready with their witnesses, and the cause was on the day calendar for trial. *Held*, that to order a reference under these circumstances, would be to encourage delay, and the motion was therefore properly denied.

A PPEAL from an order of the Special Term denying a motion made by the defendant for a reference.

Mayor &c. of New York v. Genet.

Oliver W. West, for the appellant.

John E. Parsons, for the respondents.

By the Court, WESTBROOK, J. The gravamen of the complaint in this action is, that the defendant has drawn and received from the comptroller of the city of New York, a very much larger sum of money than "was due for services, labor and materials necessary for, and which had been rendered and furnished in and about the construction and erection of a court house and place for the detention of prisoners, within the limits of the Ninth Judicial District of the city of New York." The answer denied this allegation. An issue is thus fairly presented, which will probably involve the items of the accounts for labor and materials expended and used in the erection of said building. It was, therefore, a cause which the court was fully authorized to refer, under section 271 of the Code. It is true the action was not upon an account, but the trial of the issue, doubtless, involves "the examination of a long account," which makes the cause a referable one; and that the opinion at Special Term concedes.

The Code, however, does not require such an action to be referred. The court may try it, if it pleases, and the trial without the reference is not erroneous. The issue in this cause was joined in July, 1874. It was upon the calendar of the Circuit Court for trial in December, 1874, and the judge holding such court had full power over it. Instead, however, of moving that court, upon the calendar of which it was placed for trial, the defendant moves in another branch of the same court, before another judge, to take it from the trial court and send it to a reference; and this motion is delayed until the cause is on the day calendar for trial. The plaintiffs are presumed to be ready with their witnesses, the defendant by no movement or notification undeceives, and after

Pacific Mail Steamship Company v. Irwin.

preparation for the trial is made, the motion for a reference is unexpectedly sprung upon them. It would, it seems to us, encourage delay if the discretion of the court had been exercised in favor of the defendant, and for that reason the reference was properly denied.

An order should be entered affirming the decision of the Special Term, with \$10 costs, besides disbursements, but without prejudice to the right of the trial court to make such a disposition of the action as it may see fit to do. (a)

Ordered accordingly.

[FIRST DEPARTMENT GENERAL TERM, at New York, May 3, 1875.
Brady, Daniels and Westbrook, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hum*, 658.

THE PACIFIC MAIL STEAMSHIP COMPANY vs. IRWIN.

An answer alleged that very large discretionary powers in regard to the control and management of the affairs and property of the plaintiff and in regard to the expenditure and disbursement of its funds, were conferred upon S., its president. In a succeeding paragraph it was alleged that S. had abused such discretion and misapplied, squandered and wasted the funds, including the sums mentioned in the complaint for which the defendant was prosecuted.

Held, that the allegation in the first paragraph was necessary for the intelligent statement of the defence set up in the second paragraph; and that, being in the nature of a preamble or introduction, it was not open to the charge of irrelevancy.

The answer also alleged that the plaintiff, for a good and valuable consideration, and upon a full settlement concluded between it and the said S., relinquished and discharged any and all claims in regard to the same, either against the defendant or any other person. *Held*, that the defence thus set up was by way of accord and satisfaction; and if the agreement was made as stated, it would be binding upon the plaintiff as a contract; whether in writing or otherwise.

A written release is not necessary to create an accord and satisfaction, or a full settlement and discharge.

Pacific Mail Steamship Company v. Irwin.

A defendant, having stated a defence, in his answer, is not bound so to define it, or rather enlarge it, as to set out the proofs by which it is to be established. On application to strike out an answer as irrelevant, it must appear that the matter objected to is indeed irrelevant, and that the party is aggrieved thereby. It was not designed that such an application should be granted for every redundant averment or statement in a pleading. *Per* BRADY, J. An answer is indefinite when the precise nature of the defence is not apparent.

A PPEAL, by the plaintiff, from an order made at a Special Term, denying a motion to strike out the answer as irrelevant, &c. (*S. C., very briefly reported, 4 Hun, 671.*)

H. S. Bennett, for the appellants.

R. H. Scott, for the respondent.

By the Court, BRADY, J. The answer in this action contains nothing which should be stricken out as irrelevant, or which should be made more definite and certain. The paragraph containing the statement that very large discretionary powers in regard to the control and management of the affairs and property of the plaintiffs, and in regard to the expenditure and disbursement of its funds, were conferred on its president, Alden B. Stockwell, is necessary for the intelligent statement of the defence set out in the succeeding paragraph, and which is that he had abused the discretion and misapplied, squandered and wasted its funds, including the sums mentioned in the complaint for which the defendant was prosecuted; and further, that the plaintiff for a good and valuable consideration, and upon a full settlement concluded between it and the said Stockwell, relinquished and discharged any and all claims in regard to the same, either against him, the defendant herein, or any other person whomsoever.

The defence thus set up is by way of accord and satisfaction; and whether a formal release exists or not does

not appear. It is not stated that such an instrument was made.

If the agreement was made as stated it would be binding upon the plaintiff as a contract, whether in writing or otherwise, (*Angel & Ames on Corp.*, §§ 219, 228, 231;) and the defendant having stated a defence is not bound so to define it, or rather enlarge it, as to set out the proofs by which it is to be established.

There is still another answer, and that is that the act which constitutes the defence is an act of the plaintiff, and not of a stranger.

It is the statement of a transaction which should be known to the plaintiff, if it ever occurred. The fact must be recorded in its books. It must be regarded as settled that on applications of this character it must appear that the matter objected to is indeed irrelevant, and that the party is aggrieved thereby. It was not designed that a motion should be allowed for every redundant averment or statement in a pleading.

In this district the growing love, or experiment, of motions is one which extends the calendars of special and general terms to gigantic numerical proportions. It is doubtless an instructive and ingenious process, but it is not to be encouraged. There are other modes for the acquisition of legal knowledge more genial and economical.

The statement objected to, being in the nature of a preamble or introduction, is not open, however, to the charge of irrelevancy. A pleading is indefinite when the precise nature of the defence is not apparent.

The precise nature of the defence here is apparent. It is that the plaintiff received certain claims and transfers upon a settlement and compromise in full of all demands against Stockwell and the defendant, growing out of the matters included in the settlement, and which embraced the moneys sued for in this action by the plaintiffs. The motion was properly disposed of, there-

Pacific Mail Steamship Company v. Irwin.

fore, at the Special Term, and the order made there should be affirmed.

The appeal having been thus considered on its merits, it is unnecessary to consider the question whether it is appealable or not. There are, however, it may be said, few questions of practice which, under the existing decisions relating to that subject, may not be presented to the General Term for consideration.

It is not difficult to understand that a motion to strike out matter regarded as irrelevant may involve the merits. It must depend upon the substance of the matter, viewed from a legal standpoint. It will sometimes happen, also, that though an answer is perfect in form as to the matters set out, it may not be such as to embrace the proof by which they are to be established. In this case, for example, it is by no means certain that under the averments of the answer a written release could be put in evidence. The defence does not embrace it. Such a paper is not necessary to create an accord and satisfaction, or a full settlement and discharge. (*Therasson v. Peterson*, 2 *Keyes*, 636.)

The order should be affirmed, with ten dollars costs and disbursements.

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

AMANDA O. VAIL and others, surviving executors,
&c., *vs.* JOHN W. LANE.

The attorneys for the plaintiffs and all other persons connected with their office left the same at five and a half o'clock P.M., and the office was closed and locked for the night. Between that time and six o'clock, the clerk of the defendant's attorney came to make service of an answer, and finding the office closed and locked, he procured the janitor of the building to unlock the door, and then left the answer on the table of the managing clerk; the janitor having no authority to open the office for that purpose. *Held*, that such entry of the clerk was irregular and unlawful; and that the service of the answer was not regular.

A PPEAL, by the plaintiffs, from an order of the Special Term setting aside a judgment.

Tracy, Olmstead & Tracy, for the appellants.

R. H. Huntley, for the respondent.

By the Court, DAVIS, P. J. The service of the answer was not regular. The attorneys for the appellants and all other persons connected with their office, had left the office at five and a half o'clock P.M., and the office was closed and locked for the night. Between that time and six o'clock, the clerk of the defendant's attorney came to make service of the answer, but finding the office closed and locked, he procured the janitor of the building to unlock the door, and then left the answer on the table of the managing clerk. The janitor had no authority to open the office for that purpose. His act in doing so was that of the clerk who procured him, and the entry of the clerk, under the circumstances, was irregular and unlawful.

The judgment could not, therefore, have been properly set aside for irregularity. It does not appear in the papers that it was set aside on that ground; and there are two reasons for inferring that it was not. The first is, that it is not to be presumed that the court intended

Vail v. Lane.

to uphold a service so manifestly irregular; the second is, that no costs were imposed on the appellants, as would most properly have been done if the court had held the judgment to have been irregular.

We must presume, therefore, that the order vacating the judgment was granted as a favor, in the discretion of the court; and that the respondent was not charged with costs, as is usual in granting such favors, because the court discovered some slight *acidity of practice* in the proceedings of the plaintiff's attorneys. That was a legitimate stimulant to the exercise of judicial discretion, and this court is not to be called upon to interfere with its exercise. In entering the order below, nothing has been done but to set aside the judgment. Vitality has not been given to the irregular service of the answer, nor leave to serve anew. The order should therefore be modified by giving leave to re-serve the answer as of the date of the attempted service, so far as affects the date of the issue, with leave to reply to the answer if necessary, or to demur, or to make any motion in respect of the answer on any ground except the regularity of its service; and as thus modified the order should be affirmed, without costs to either party.(a)

Judgment accordingly.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, briefly reported, 4 *Hum*, 658.

BAXTER vs. THE MISSOURI, KANSAS AND TEXAS
RAILWAY COMPANY.

Upon an order requiring a debtor of the defendant to appear and be examined because of his refusal to give the certificate specified in section 236 of the Code for the benefit of an attaching creditor, the debtor can state the character in which he holds the moneys, and the manner in which they were obtained, and the object of gathering them together. But this should be the limit of the examination.

Whether the funds are held under a trust, and whether the trust is valid or not, may be the subject of investigation in another mode.

When the certificate is given, unless it be false, the proceeding is at an end; but a refusal to give it, even when the party says he has no property of the debtor, warrants the order for examination.

The creditor is not bound to accept the statement, and may pursue the remedy, subject to its burdens, if any.

A PPEAL by L. H. Meyer, from an order made at Special Term, directing him to appear and be examined as to property alleged to be held by him for the benefit of the defendant.

John E. Burrill, for the appellant.

Coles Morris, for the plaintiff.

By the Court, BRADY, J. It appears that the appellant refused to give the certificate contemplated by the Code, § 236, for the benefit of an attaching creditor. When the refusal occurs, the creditor is entitled to an order requiring him to appear and be examined. On the examination, the appellant can state the character in which he holds the moneys he has in his hands, and the manner in which they were obtained, and the object of gathering them together. This would be the limit of the examination. Whether the funds were held under a trust, and whether the trust was valid or not, might be the subject of investigation in another mode. The appellant must put himself upon the record correctly, and if he have no money of the defendants

Baxter v. Missouri, Kansas and Texas Railway Co.

the fact will appear; if he have, it must be protected for the plaintiff's benefit, by whose diligence it has been subjected to authority. It was held that property incapable of manual delivery to the sheriff was not only that which from its nature was incapable of such delivery, but that which has become so from its peculiar position, as where it is under pledge or consignment with advances upon it. (*Clarke v. Goodridge*, 41 *N. Y. Rep.*, 210.) Section 236 of the Code applies to all such property. The special character of the property held by the appellant may preserve it from the plaintiff's process, but that is, as already suggested, a matter for a different kind of consideration.

In this proceeding, when the certificate is given, unless false, it is at an end, (*Reynolds v. Fisher*, 48 *Barb.*, 146;) but the refusal, even when the party says he has no property of the debtor, warrants the order for examination. (*Ibid.*)

The creditor is not bound to accept the statement, and may pursue the remedy, subject to its burdens, if any. The order appealed from must be affirmed, with \$10 costs and disbursements. (a)

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported briefly, 4 *Hun*, 630.

ASA F. MILLER *vs.* THE NATIONAL STEAMSHIP CO.

The National Steam Navigation Company, preparatory to a dissolution of that corporation, transferred all its property to two liquidators, under the provisions of an English statute, and the said liquidators transferred all of said property to the defendant, on the 16th day of August, 1867; and on that day the Navigation Company ceased to do business, and commenced to wind up its affairs. Such transfer was made substantially upon the agreement and condition that the defendant should take and accept such property subject to the rights and equities therein subsisting, and particularly to the discharge of the several liabilities appearing on the books, papers and documents of the Navigation Company, and to all other liabilities of that company to which the said property was then subject; and would bear, pay and discharge, in due course, the several liabilities disclosed in said books, papers and documents, and all other debts, if any, of the said Navigation Company, and would devote and apply the property so to be made over to it for that purpose. On the 23d of June, 1868, a judgment was recovered by the plaintiff's assignor, as administratrix, against the Navigation Company for an injury to her intestate, caused by the negligence of that company in navigating its vessel, on the 24th of October, 1867. In an action brought by the plaintiff to enforce that judgment against the defendant on the ground that it had assumed to pay the debts and liabilities of the Navigation Company :

- Held*, 1. That the liability to the plaintiff's assignor for an injury which occurred to her intestate on the 24th of October, 1867, could not appear in the books, papers and documents of the Navigation Company on the 16th of August preceding, and was not then a debt or liability of that company which was or could be assumed by the defendant.
2. That the action of the plaintiff's assignor, in which the judgment was recovered, was brought against the wrong party. That the defendant being, at the time when the injury occurred, the owner of the vessel causing the injury, and engaged in its navigation, the alleged wrongful act and negligence were its own, and not those of the Navigation Company, the corporation which was sued.
3. That it could not be held that by the agreement made on the transfer of the property the defendant bound itself to pay its own liabilities that might thereafter spring out of the wrongful acts and negligence of its own servants ; nor did the agreement contemplate or provide for liabilities of that kind which might be asserted by actions improperly brought against the Navigation Company, which had ceased to do business, and was existing only in the process of winding up its affairs.
4. That the agreement did not embrace the judgment in question, unless it appeared that the injury happened by the act of the Navigation Company, or of its liquidators, *in the course of the winding up of its affairs*, under the statute mentioned therein.
5. That it not being shown that the defendant was a privy to the suit against

Miller v. National Steamship Company.

the Navigation Company, so that the judgment therein could be treated as a judgment against itself, the defendant was not bound, nor estopped by such judgment; and that the complaint was properly dismissed.

A PPEAL by the plaintiff, from a judgment of the Special Term dismissing the complaint.

Henry Morrison, for the appellant.

John Chetwood, for the respondent.

By the Court, DAVIS, P. J. This appeal is taken from a judgment dismissing the complaint, with costs. The papers furnished us omit the judgment roll, and contain nothing but the bill of exceptions and notice of appeal. The bill of exceptions states that at the trial the plaintiff applied and had leave "to amend his complaint by striking out such matters as might be inconsistent with such amendment, and by inserting instead thereof allegations that the defendant and the National Steam Navigation Company were separate and distinct corporations, and that the defendant accepted the National Steam Navigation Company's property with a distinct agreement to pay the last mentioned company's debts and liabilities." The answer of the defendant was then "so amended as to set up a general denial of these allegations." The action, therefore, upon the amended pleadings, must be deemed to be one to enforce in favor of the plaintiff an agreement, alleged to have been made by the defendant to pay the debts and liabilities of another corporation, in consideration of the transfer by such corporation or its liquidators, of all its property to the defendant. The plaintiff gave evidence to show that his assignor, on the 23d day of June, 1868, recovered a judgment in the Superior Court of the city of New York, against the National Steam Navigation Company, for \$3,289.05 damages and costs, on which an execution had been duly issued and returned unsatisfied.

Miller v. National Steamship Company.

The judgment roll showed that the recovery was for an injury to the intestate of the plaintiff's assignor, which caused the death of such intestate, and that such injury was produced by the wrongful act and negligence of the National Steam Navigation Company in the navigation of the ship *Pennsylvania*, on the 24th day of October, 1867, at which time, it was alleged, the said ship belonged to that company. It showed also that the Navigation Company appeared, and by its answer admitted its own incorporation, and that a collision occurred at the time mentioned between the ship *Pennsylvania* and the boat on which the intestate was injured; but put in issue the ownership of the *Pennsylvania* and all other allegations of the complaint. The plaintiff then gave evidence tending to show that the defendant in this action was incorporated under the laws of Great Britain, &c., on the 1st day of July, 1867, by the name of "The Steamship Company, limited," and that on the 8th day of August, 1867, its name was changed to "The National Steamship Company, limited." That the National Steam Navigation Company, preparatory to a dissolution of that corporation, transferred all its property to two liquidators, under the provisions of the act of parliament known as "The Companies' Act, 1862;" and that said liquidators transferred all of said property to the corporation now sued, on the 16th day of August, 1867, and on that day the Navigation Company ceased to do business, and commenced to wind up its affairs; that such transfer was made substantially upon the agreement and condition that the National Steamship Company should take and accept such real and personal property, subject to the rights and equities therein subsisting, and in particular to the discharge of the several liabilities appearing on the books, papers and documents of the Navigation Company, and to all other liabilities of the last named company, to which the said real and personal property was then subject; and would

Miller v. National Steamship Company.

bear, pay and discharge, in due course, the several liabilities disclosed in said books, papers and documents aforesaid, and all other debts, if any, of the said National Steam Navigation Company, and would devote and apply the real and personal property so to be made over to them for that purpose. It is of course apparent that the liability to the plaintiff's assignor for an injury which occurred to her intestate on the 24th of October, 1867, did not appear in the books, papers and documents of the Steamship Navigation Company on the 16th of August preceding; nor was it then a debt or liability of that company which was or could be assumed by the present defendant.

In fact the case shows that the action of the plaintiff's assignor was brought against the wrong party. When the injury occurred, the National Steamship Company was the owner of the steamship Pennsylvania, engaged in its navigation, and the alleged wrongful act and negligence were its own, and not those of the corporation which was sued. Neither on sound law nor logic can it be held that by the agreement made on the transfer of the property the defendant bound itself to pay its own liabilities that might thereafter spring out of the wrongful acts and negligence of its own servants; nor did the agreement contemplate or provide for liabilities of that kind which might be asserted by actions improperly brought against the company, which had ceased to do business, and was existing only in the process of winding up its affairs.

The agreement relied upon does not, therefore, embrace the plaintiff's judgment, unless it appears that the injury happened by the act of the Navigation Company, or of its liquidators, *in the course of the winding up of its affairs* under the act referred to. That does not appear, and probably could not be made to appear consistently with truth, because the Pennsylvania had obviously become the property of another corporation

Miller v. National Steamship Company.

which was using that ship for its own purposes. It is not shown that the present defendant was a privy to the suit against the former company, so that the judgment can either in law or equity be treated as a judgment against itself. It was not prosecuted; it had, so far as appears, no notice of the suit, and it had no opportunity to appear and defend, and the action was not one in which the present defendant was bound to respond to the defendant in that suit, on the ground that the wrong for which the action was brought was the negligence of the former and not of the latter. A., who is *improperly* sued for B.'s wrongs, cannot compel B. to defend or be liable for the result, by notice that he is sued for an act for which B. alone is liable. Nor can a plaintiff sue a party not liable for an injury, and then subject the actual wrongdoer to liability for the result, by notice of the pendency of such a suit. The privity essential to charge persons not parties to the record, and which makes notice of the suit an *estoppel in pais*, is altogether lacking in the supposed cases. As the defendant was not bound to defend an action brought against the National Steam Navigation Company for an injury committed by itself, the recovery in the case is no estoppel to any action brought against itself for the same alleged wrong. Nor is the finding of the jury, in that case, that the defendant therein was the owner or navigator of the Pennsylvania an estoppel on that question, against the present defendant. But if this were otherwise, there is a failure of proof, in this case to bring it within the rules governing the liability of privies.

It was not error to exclude the statement of the agent, as to the ownership of the Pennsylvania. To make declarations of that character was no part of the duties of his employment by the defendant; and although his assertion that the National Steam Navigation Company was the owner of the Pennsylvania, doubtless led to the commencement of the suit against the wrong party, yet

Devlin *v.* Devlin.

it does not establish the fact asserted, nor charge the present defendant with the judgment in that case by reason of its falsity.

We think the complaint was properly dismissed; and that the judgment should be affirmed with costs.

Judgment affirmed. (a)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported briefly, 4 *Hun*, 654.

JEREMIAH S. DEVLIN and another *vs.* JOHN S.
DEVLIN.

An injunction restrained the defendant from using the plaintiff's firm name ("Devlin & Co.") in any form or manner; and it further ordered that "the said John S. Devlin be and he is hereby confined — whenever the word Devlin appears or is used in his advertisements, signs, placards, slips or other means and modes of making known his business or place of business, or offering for sale, or selling his goods, &c. — to his own proper Christian, middle and surname conjoined, and without monograms, signs or other devices which may tend to mislead or induce the public or any other person as aforesaid; and it is further ordered that the said John S. Devlin be and he hereby is confined to the use of his own name, John S. Devlin, or J. S. Devlin, without the use of any monogram containing the initials J. S. or other device as aforesaid; but nothing herein is to be construed or interpreted as preventing the said defendant from using his own name in his advertisements, signs or placards." It was not alleged that the firm name "Devlin & Co." had been used; but the defendant had placed upon his store a sign containing his own name (J. S. Devlin) with the initials "J. S." so arranged as partially to conceal them, and to mislead the public, and induce them to suppose the defendant's store was that of the plaintiff's. *Held*, that this was a breach of the injunction.

A PPEAL from an order of the Special Term, adjudging the defendant to be in contempt for violating an injunction.

Devlin v. Devlin.

Walter Edwards, Jun., for the appellant.

John E. Devlin, for the respondent.

By the Court, DAVIS, P. J. The defendant was manifestly guilty of an attempt, by use of the long established firm name of the plaintiffs, to attract custom to his shop by deception on his part. There was no firm. His business was carried on by himself without a partner, and the assumption of the firm name of the plaintiffs who were in the same business, was not only a violation of their rights, but a criminal misdemeanor under the statute. Hence the injunction of the court was very properly granted. The injunction restrained the defendant from using the firm name "Devlin & Co." in any form or manner, and it further ordered "that the said John S. Devlin be and he is hereby confined — whenever the word 'Devlin' appears or is used in his advertisements, signs, placards, slips or other means and modes of making known his business, or place of business, or offering for sale or selling his goods, wares and merchandise—to his own proper Christian, middle and surname conjoined, and without monograms, signs or other devices which may tend to mislead or induce the public or any other person as aforesaid. And it is further ordered that the said John S. Devlin be and he hereby is confined to the use of his own name, John S. Devlin, or J. S. Devlin, without the use of any monogram containing the initials J. S. or other device as aforesaid; but nothing herein is to be construed or interpreted as preventing the said defendant from using his own name in his advertisements, signs or placards." It is not asserted that the firm name "Devlin & Co." has been used, but that a sign which contains the name of J. S. Devlin has been so arranged that it tends to mislead and deceive the public, in a manner forbidden by the injunction. The learned justice below came to the conclusion

Devlin v. Devlin.

that that was the intent of the arrangement of the figures, letters and words of the sign. "The inquiry is, here," he says in his opinion, "is the court convinced that the present sign is an effort to continue, with a less flagrant use of means, the same attempt." It seems to us obvious that this was the true question; because the injunction, which was in full force, restrained the defendant to the use of his own name "without monograms, signs or other devices which may tend to mislead or induce the public," &c., as the firm name, "Devlin & Co." was held to have done. It is quite clear to us that the object of the defendant in preparing the sign now complained of was to attract and fix the public eye on the words "Devlin's Clothing." The arrangement of the letters "J. S." between the figures on the upper line of the sign was not to display them as the initials of the defendant or to connect them with the word "Devlin," on the line below, but to disconnect and partially conceal them, so that the casual observer would fail to notice them as belonging to the words below, and thereby be led to suppose that the shop of the defendant was the establishment of the plaintiffs, long and well known as "Devlin's Clothing Store." The defendant was prohibited by the injunction from using his own name so as to operate on the public as a deception of that kind; and although one who stopped and carefully studied the sign might observe that the letters "J. S." were initials of the name, yet less careful observers might easily take them for arbitrary or cabalistic signs forming no part of the name. The court below held that the latter was the intent of the defendant. The ruling certainly sails very close to the wind, but the impression left on our minds as to the intent and effect of the acts of defendant is in the same direction. It was certainly easy for the defendant to have obeyed the injunction strictly, till he could have obtained its modification or dissolution. But he chose to experiment

Matter of Bainbridge.

upon it, and if in doing so he has stepped over the forbidden line, he has only himself to blame for the consequences. We think the order appealed from should be affirmed with \$10 costs, besides disbursements.(a)

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported briefly, 4 *Hun*, 651.

Matter of the petition of HENRY BAINBRIDGE and
others, executors, &c.

Where a plaintiff is under a stay of proceedings, at the time of his death, such stay does not affect his representatives, so as to prevent a motion by them to revive and continue the action.

And unless such motion be made within a year, as required by § 121 of the Code, it will be barred.

APPEAL by the defendants in an action brought by Richard Bainbridge, now deceased, in his lifetime, against Charles F. Livermore and others, from an order made at a Special Term, granting a motion made by Henry Bainbridge and another, executors of said Richard Bainbridge, for leave to revive and continue the action, &c.

The action in question was commenced in November, 1864, to recover damages for the alleged illegal sale of the plaintiff's stocks, gold and other securities. In an action commenced the year previous, by Livermore and his associates, against said Richard Bainbridge, the latter, in his answer, set up as a defence, that the plaintiff had wrongfully sold his stocks. That action was referred. When this action came on to be tried, at the circuit, before a jury, on the 18th of March, 1870, Livermore & Co. applied to the court for a stay of proceed-

Matter of Bainbridge.

ings, on the ground that all the issues embraced in both actions could be tried in one; and that the defendant Bainbridge, if entitled to affirmative relief, could have it as a defendant, as well as if he were a plaintiff. An order was thereupon entered staying all proceedings in this action till the other should be tried.

The case was tried, and resulted in a long contest, in which the other side tried, first, to prevent Bainbridge from obtaining affirmative relief, on questions of pleading, and then, upon his death, contested the right of the petitioners to revive that action. (*See Livermore v. Bainbridge*, 49 N. Y., 125.) In that action the executors of Bainbridge obtained a judgment for \$120,000; which judgment was set aside, by an order made at a Special Term.

Richard Bainbridge died on the 23d of July, 1871. The proceedings in the action in which he was defendant, and Livermore, Clews & Co. plaintiffs, were not terminated until the summer of 1874. During all this time the proceedings in this action were stayed by the order of March 18, 1870.

This application was made to the court to vacate the stay of proceedings, and for leave to the petitioners, the executors of the will of said Richard Bainbridge, deceased, to continue the action, and for other incidental relief.

E. P. Wheeler, for the appellant.

Robert Sewell, for the respondents.

By the Court, BRADY, J. The application to revive the action commenced by Richard Bainbridge against Charles F. Livermore and others, on account of the death of the plaintiff, was not made for several years after the death occurred. The plaintiff was under a

Matter of the New York Bridge Company.

stay of proceedings, it is true, but that stay did not affect his representatives.

The revival of the action was not a proceeding contemplated by, or embraced in, the stay. It cannot be regarded as a proceeding other than to prevent the abatement of the action. It is one of the modes provided for that purpose. The authorities are a unit on the necessity of making the motion to revive within the year, under section 121 of the Code. (*Allen v. Walter*, 10 Abb., 379. *Matter of Bornsdorff v. Lord*, 41 Barb., 211. *Coon v. Knapp*, 13 How., 175. *Gordon v. Sterling*, Id., 405. *Greene v. Bates*, 7 How., 296.) The stay, for the reason assigned, did not prevent the running of the time. Indeed the running of the time against the personal representatives is a reason why the stay should not be regarded as affecting their remedy to have the action revived. The petitioners' course is by supplemental complaint.

The order made must be reversed, therefore, with \$10 costs and disbursements to abide event.(a)

Order reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported briefly, 4 *Hum*, 674.

Matter of the petition of the NEW YORK BRIDGE
COMPANY to acquire land, &c.

Where, upon an application by a corporation, under the general railroad act, to acquire land for its purposes, a petition, full and complete in its statements, and containing all the requisite averments, is presented by the applicants, the fact that owners appear and show cause, denying some of the allegations in the petition, and objecting to the legality of the proceedings,

Matter of the New York Bridge Company.

does not create issues which render it obligatory upon the petitioners to prove the facts alleged in the petition.

The fifteenth section of that act puts upon the owner of the land the burden of proving, and by legal evidence, that the facts alleged in the petition are not true. An affidavit or answer is not sufficient for that purpose.

If, on the day of showing cause, no testimony is given or offered, showing the facts set forth in the petition to be untrue, an order may properly be made, appointing commissioners of appraisal, without further proof of them than that presented by the petition.

Under the provisions of the act incorporating the New York Bridge Company, (*Laws of 1867, chap. 399*), it is not necessary for such company to serve notices upon the actual occupants of land over or upon which the bridge is to extend or rest, in accordance with the provisions of section twenty-two of the general railroad act; and the omission to give such notices is not a jurisdictional defect.

Section twenty-six of the general railroad act, which provides that if any title or interest in real estate required by any company shall be vested in any trustee not authorized to sell, release or convey, or in any infant, idiot or person of unsound mind, the Supreme Court shall have power to authorize such trustee, or the general guardian or committee, to sell and convey the same, was designed to enable the trustee, guardian or committee to move in order to acquire the power to contract or agree for the sale of the land; and is not compulsory upon the railroad company.

By statutes passed in 1867 and 1869 the bridge across the East river, between New York and Brooklyn, was required to be completed on or before the first day of June, 1874. On the fifth day of June, 1874, four days after the expiration of the limit, the legislature passed an act providing for the completion of the bridge, and authorizing the cities of New York and Brooklyn, by the issue of bonds, to pay moneys, during the years 1874 and 1875, towards that object. *Held*, that this was not only a legislative waiver of the limit previously declared, but an extension of the time during which the bridge should be finished.

The provisions of the first section of said act of June, 1874, declaring that when the cities above named should accept the provisions of the third section, and when the owners of two thirds of the private stock of the bridge company should accept the provisions of the second section, then and thenceforth the board of directors of the company should consist of twenty members, to be appointed, eight by the mayor and comptroller of each of said cities, &c., is not a condition precedent controlling the effect of the act as a legislative waiver of the limit, or extension of the time of performance. Such waiver was absolute and unconditional.

A PPEAL from an order appointing commissioners of appraisal. (*S. C., reported briefly, 4 Hun, 635.*)

Matter of the New York Bridge Company.

Edgar M. Cullen, for the company.

W. F. Shepard, for the appellants.

By the Court, BRADY, J. The petitioner was incorporated, by chapter 399 of the Laws of 1867, for the purpose of constructing a bridge between the cities of New York and Brooklyn, provided the bridge was completed and opened to public use on or before the first of June, 1870.

The bridge was to commence at or near the junction of Main and Fulton streets in the city of Brooklyn, and to be so constructed as to cross the river, as directly as possible, to some point at or below Chatham Square, not south of the junction of Nassau and Chatham streets, in the city of New York. By the provisions of the same act the petitioner, in case of its inability to purchase the necessary land, was authorized to acquire the same by the proceedings prescribed by the general railroad act for the acquisition of land by railroad companies. The time within which the bridge was to be completed was, by chapter twenty-six of the Laws of 1869, extended to June 1, 1874; and by section three of chapter 601 of the Laws of 1874, a provision was made for the purpose of completing the same, and the cities of New York and Brooklyn were authorized, in addition to the amount which had then been subscribed, to issue bonds and to provide and to pay to the petitioner as follows: the city of New York, the sum of \$500,000 in each of the years 1874 and 1875, and the city of Brooklyn \$1,000,000 in each of said years and 1875, for which sum each was to be invested with the stock of the petitioner equal in amount to such sum paid.

This act was passed on the 5th of June, 1874. The petition contained all the necessary averments to comply with the requisitions of the statutes relating to such applications. It appeared from them that the lands

Matter of the New York Bridge Company.

devised were devised by a testator to a trustee merely to lease the same, and from the rents to pay an annuity of \$5,000 to the testator's widow during life, and, after certain payments, to pay the surplus to his three daughters; the will providing that after the death of the widow, the three children should each share one-third of the testator's property for life, with the remainder in fee to the children of his daughters, absolutely.

It appeared, further, that all of the children had been married and had issue; and that such issue were living and all infants under the age of twenty-one years.

The statements in these respects were full and complete. On the presentation of the petition all the infants appeared by a guardian *ad litem*, the daughters of the testator and mothers of the infants appeared by attorney and counsel, and the trustee also appeared. The infants submitted their rights to the protection of the court, and the adults showed cause, denying some of the allegations in the petition, and presenting a series of objections to the legality of the proceedings adopted, both in form and substance. No testimony was given or offered on either side. It is supposed by the appellants that such denials and answers created issues which rendered it obligatory upon the petitioners to prove the facts alleged by them in the petition; but this is an erroneous view of the statute.

The fifteenth section of the railroad act (*Laws 1850, p. 211*), put upon the owner of the land the burden of proving, and by legal evidence, that the facts alleged in the petition are not true. And an affidavit or answer is not sufficient for that purpose. (*Buffalo and State Line R. R. Co. v. Reynolds and wife*, 6 *How. Pr. Rep.*, 96.)

The decision rests upon the language of the statute, which provides that all persons whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and "*may disprove any of the facts alleged in it,*" &c.

Matter of the New York Bridge Company.

The result of the application of the rule thus declared is that there was no proof showing the facts set forth in the petition to be untrue, and that the order of the court, made without further proof of them than that presented by the petition, was correctly made.

It was also urged by the respondents that no notice having been given to the actual occupants of the land over or upon which the bridge was to extend or rest, in accordance with the provisions of section twenty-two of the general railroad act, (*supra*,) and which, in reference to the locality or route of a railroad, requires that such notice shall be given, there was a jurisdictional defect, and the court could not proceed further in the matter. It will be seen, however, in reference to the act incorporating the petitioner (section 11) that although the special proceedings to acquire land shall be in accordance with the provisions of the general railroad act, and such act and the acts amendatory of it are made applicable, as far as may be, in like manner as if they were named in the act of incorporation, yet it is expressly provided that such modifications may be made in the formal part of the proceedings, in order to apply the same to the petitioners, instead of a railroad corporation, as shall be approved of by the Supreme Court.

And it is further provided that the court may make such orders and regulations, as to the mode and manner of conducting the proceedings, and all things relating thereto, as it may deem proper, so as to effectuate and make the same valid for acquiring title to such real estate. These provisions were induced by the difference between the thing to be done, the work to be accomplished, and the object in view, which was the construction of a bridge across a navigable river, and the laying out and making a railroad track—a work confined chiefly to the land—to give, in other words, to the Supreme Court, *mutatis mutandis*, the power of departing from the strict letter of the general railroad act in

Matter of the New York Bridge Company.

requirements which were not designed to apply to the petitioner in proceedings of this character, or to the preliminaries which would be demanded of a railroad company, under the general railroad law.

For this reason, we think the court at Special Term was not without jurisdiction because the notices mentioned were not served, it being our judgment that the service of them on the part of the petitioner was not necessary, under the provisions of the act of incorporation.

It was also urged against the petitioner that under the provisions of section twenty-six of the general railroad law, (*supra*,) it was the duty of its officers to apply for the appointment of some person with whom an agreement could be made for the purchase of the land desired. It will be found, upon examination, however, that the provision of the section mentioned is for the benefit of the trustee and infant or idiot owner of the land, and not compulsory upon the railroad company. It provides that if any title or interest in real estate, required by any company formed under the act, shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the Supreme Court shall have power, by a summary proceeding or petition, to authorize and empower such trustee, or the general guardian or committee of such infant, idiot or person of unsound mind, to sell and convey the same, on such terms as may be just, &c.

It is very clear that these provisions are designed to enable the trustee, guardian or committee to move, in order to acquire the power to contract or agree for the sale of the land, under the supervising power of the court, for the exercise of which provision is also made in the section.

It is to enable them to avoid the consequences of the appointment of a commission and the doubtful result of

Matter of the New York Bridge Company.

appraisal, in cases where, if a fair price can be obtained by agreement, it may be secured for the owner. When the estate is in the hands of trustees, or situate as contemplated by this section, the compulsory mode is prescribed by section two of the act of 1857 (*Laws of 1857, p. 871*), amendatory of the general railroad act of 1850, (*supra.*)

It provides that when there shall be one or more of the estates enumerated in article one of title two of chapter one of the second part of the Revised Statutes, entitled "Of the creation and division of estates" in any land required by any railroad company for the purpose of its incorporation, such company may acquire such estate and land by means of the special proceedings authorized by the act thereby amended. It further provides for the statements to be contained in the petition, in addition to those required by the act thus amended, and demands such abundance and accuracy of detail as will enable the court to appreciate the character of the estate, and the persons interested in it, and provides, also, by the appointment of proper persons, attorneys or officers of the court, for the protection of the interest of such persons, not only before the appraisal is made, but subsequent thereto.

The estate, a part of which is sought by the proceedings herein, is embraced within the provisions of the Revised Statutes mentioned, and the petition presented contains, therefore, a statement in detail of the estate, its creation and the persons interested in it for life and in fee.

The objection urged, and now considered, cannot avail the respondents, therefore. It is not well taken.

It was also objected that the power of the petitioner to finish the bridge had ceased, even if the petitioner's corporate existence had not been terminated by the limits of the charter. And this objection rests on the provisions of the statutes of 1867 and 1869, (*supra.*) to the

Matter of the New York Bridge Company.

effect that the bridge must be completed on or before the 1st of June, 1874. The answer to this is, as we have seen, that on the 5th of June, 1874, and four days after the expiration of the limit, the legislature passed an act providing for the completion of the bridge, and authorized the cities of New York and Brooklyn, by the issue of bonds, to pay moneys during the years 1874 and 1875 towards that object.

This was not only a legislative waiver of the limit previously declared, but an extension of the time within which the bridge should be finished. The provisions of the first section, declaring that when the cities of New York and Brooklyn should accept the provisions of the third section, and when the owners of two-thirds of the private stock of the New York Bridge Company should accept the provisions of the second section, then and thenceforth the board of directors of the company should consist of twenty members, to be appointed, eight by the mayor and comptroller of each of said cities, &c., is not a condition precedent, controlling the effect of the act as a legislative waiver of the limit, or extension of the time of performance. These provisions relate to the organization of the board of directors, and their authority to purchase from any private stockholder his rights, on his giving his assent to the act by an instrument in writing, &c.

The condition relates to the appointment of the directors in the manner stated in the act, and which cannot be accomplished until, as contemplated, the acceptance of the provisions of section three, relating to the issue of bonds for the amounts therein named, and the acceptance by two-thirds of the owners of the private stock, of the provisions of section two.

The completion of the bridge is not made by the act dependent upon such acceptance. The design of the statute was to give the cities of New York and Brooklyn the right to appoint eight directors, each, of the

Matter of the New York Bridge Company.

board, and thus to have some control, respectively, of the operations of the company and of the appropriation of the moneys to be paid by them respectively, by a representation in the board to guard the rights of the municipalities whose funds were to be invested in the enterprise. There is nothing, therefore, in the objection considered. There was no condition imposed upon the right to finish the bridge by private accessions of money in case the cities of New York and Brooklyn declined to pay what was contemplated. The waiver of the forfeiture was not conditional. It was absolute and unconditional. (*The People v. The President &c. of the Manhattan Co.*, 9 *Wend.*, 380, 381.)

The objection that the map and survey required by the general railroad act was not filed in the clerk's office, was not well taken, because section 3, of chapter 560 of the Laws of 1871, directs that it be filed in the register's office.

The objection to the manner of service of notice of the proceeding upon one of the infants, if it had any merit, has been removed. She has appeared, and, on her own application, she being over fourteen years of age, a guardian was appointed to appear for her. He did so, and that circumstance gave the court jurisdiction.

These views cover the considerations pressed upon the argument and stated upon the points, except the proposition that the act of 1874, so far as it relates to the issue of bonds, is, under the provisions of the constitution, void, because no city can "give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation."

It has not been deemed necessary to consider this point, inasmuch as the right to issue bonds is not involved in this controversy, and because the subject to which it is allied, herein, namely, the waiver of the forfeiture depends upon the act of the legislature, and on no particular part of it.

United States v. Graff.

It is the passage of an act after the time limited for performance, indicating plainly that the conditions of previous acts upon the subject should not prevail.

Forfeitures are not favored by the courts, as shown by the case in 9 *Wendell*, (*supra*,) and the authorities therein cited; and the magnitude and importance of the enterprise to which this matter relates, and the private interests involved, are too great to be abandoned on any other than an unmistakable intention on the part of the legislature to destroy it.

The order should be affirmed.

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

THE UNITED STATES vs. GRAFF.

An action, by the United States, for the recovery of a sum of money claimed to be due and owing to the plaintiff, for unpaid duties upon imported goods, may be brought in a state court.

The primary object of such an action is not simply to execute the laws of the United States, but to collect a debt by enforcing an obligation due to it.

And in that class of cases, the United States, as a body politic, can maintain an action in a state court, in the same manner as other states and sovereignties may sue.

In the affidavit upon which an attachment, in such an action, was issued, it was stated that the defendant had "imported and brought into the United States, at the port of New York," the goods upon which the duties had accrued. *Held*, that these words amounted to an allegation of an importation of the goods by the defendant, complete in its nature, with the control and possession of the property actually in him.

Held, also, that by importing the goods, the defendant had become indebted to the plaintiff for the amount of the duties; and that the law would infer that he intended and promised to pay the same.

Held, further, that to enforce that liability an attachment might be issued. A former action for the same cause, commenced in another court, is no bar to a subsequent one, where it appears that no process was ever served in such former action, upon the defendant, and hence the court acquired no jurisdic-

United States v. Graff.

tion over the person; and that the attachment against property, issued therein, has been vacated.

It is the duty of a sheriff, acting under an attachment, to attach the real and personal estate of the debtor. And that can only be done by taking it into his custody, where the property is tangible in its character.

Hence, an order directing a sheriff, under an attachment, to open a safe and tin box containing the property and securities of the defendant, on deposit in a trust company, and to take therefrom and safely keep the property and evidences of debt, liable to attachment, found therein, is not improper.

Such safe and box are not within the protection which the law affords to a debtor's dwelling house, against an officer acting under civil process. They are simply places of deposit and safe keeping, which the sheriff may enter to make the seizure required by law, in the execution of the process.

An order directing the exclusion of the counsel and agents of each party, at the time of the opening of a safe containing the property and securities of the defendant, by the sheriff, is a proper exercise of the discretion of the court.

THE defendant appeals from so much of the order made by the Special Term at Chambers as denied his motion to vacate an attachment issued against his property in this action, and directed the sheriff to open a safe of the Mercantile Trust Company, and a tin box, in which it was claimed he had property and securities on deposit. The Mercantile Trust Company appeals from so much of such order as directs the sheriff to open the safe and tin box and take from them, and keep, the property and evidences of debt liable to attachment found therein; and the plaintiff appeals from the part of the order directing the exclusion of counsel and agents of each party, at the time of opening such safe, by the sheriff. (*S. C., briefly reported, 4 Hun, 634.*)

S. G. Clarke, for the defendant.

Alexander & Green, for the Trust Company.

Edmund H. Smith, for plaintiff.

By the Court, DANIELS, J. This action was brought for the recovery of a sum of money claimed to be due

United States v. Graff.

and owing to the plaintiff for duties unpaid on silks imported from a foreign country into the United States, by the defendant. It was strenuously insisted, in support of his appeal, that the court had no jurisdiction over the case, by reason of its supposed want of authority to enforce the laws of the government of the United States. How far such an objection should be allowed to extend it is not necessary to determine in this case. For, the primary object of this action is not simply to execute the laws of the United States, but to collect a debt by enforcing an obligation due to it. And in that class of cases the United States, as a body politic, can certainly maintain an action in this court, the same as other states and sovereignties may. (*Delafield v. State of Illinois*, 26 Wend., 192. 2 Hill, 159. *United States v. Dodge*, 14 John., 95. *Same v. White*, 2 Hill, 59. *State of Michigan v. Phœnix Bank*, 33 N. Y., 9.) Under the rule which these authorities maintain, no reason exists for doubting the jurisdiction of this court over the present action.

The cause of action set forth in the complaint in this suit is the amount claimed to be owing to the plaintiff for the duties upon eight cases of piece silk, imported and brought into the United States, within the state and county of New York, from Hamburg, in Germany. And the facts out of which it arose are imperfectly set forth in the affidavit on which the attachment in the action was issued. This affidavit was objected to as insufficient, principally on account of the defective statement of facts contained in it. And while it cannot be commended in this respect and in a case of so much importance, it must yet be held that its defects are not so substantial as to require a dismissal of the attachment. It appears from the statement made in it that on or about the sixteenth of October, 1874, the defendant imported and brought into the United States, at the port of New York, from Hamburg in Germany, by

United States v. Graff.

the steamship Cambria, eight cases of piece silks subject to duties to the plaintiff to the amount of eighteen thousand dollars in gold; and that the same had not been paid by him. It is objected that because an importation may, under certain circumstances, be made within the laws of the United States, while the goods may still remain under its control and subject to its authority, before the duties can lawfully be required to be paid; that this may have been a transaction of that character. One answer to this objection arises upon the circumstance that those importations are somewhat exceptional in their nature, and the statement made in the affidavit contains nothing warranting the conclusion that this was a transaction of that nature. On the other hand the description given of it is that of an importation complete in its nature, with the control and possession of the property actually in the defendant. That is the ordinary signification of the words used, that he had "imported and brought into the United States, at the port of New York," the goods on which the duties had accrued. And under the circumstances of the case they should be understood in that sense.

By giving that construction to them it does appear, from the affidavit, that the defendant had completely imported the goods mentioned in it. He had brought them into the United States, and by that act availed himself of the privilege which the laws conferred upon, and secured to, persons importing property only on the payment of the duties prescribed. By doing that he had become indebted to the plaintiff for the amount of the duties; and the law will infer that he intended and promised to pay it. He derived a benefit from those laws by reason of his act, for which a fixed equivalent has accrued and become due from him. The affidavits produced on the part of the defendant tend to show that no such goods were imported on the Cambria. But their effect was entirely overcome by others read on

United States v. Graff.

the part of the plaintiff indicating a decided probability that the defendant did import the goods, but probably designed, in doing so, to evade the payment of the duties upon them. By that act, even if he had shown it as a fact, the law would not permit him to shield himself against liability for their payment. For it does not permit a party to protect himself against his ostensible obligations by alleging his own wrong, by way of defence.

The case should now be disposed of on the facts disclosed in the affidavit on which the attachment was issued. And from them an obligation to pay the duties was made to appear; and consequently a promise to make such payment will be inferred in favor of the plaintiff. It has been said to be a familiar principle of law, that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do. (1 *Pars. on Cont.*, 5th ed., 4.) And in *Ogden v. Saunders* (12 *Wheat.*, 213,) it was held, by Marshall, C. J., that "a great mass of human transactions depends upon implied contracts, upon contracts which are not written, but which grow out of the acts of the parties." In such cases the parties are supposed to have made those stipulations which as honest, fair and just men they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts unexplained by compact impose certain duties, and that the parties have stipulated for their performance. And in this spirit it holds, in favor of individuals, that corporations agree to perform the duties enjoined, for their benefit, upon them. (*New York and New Haven R. R. Co. v. Schuyler*, 34 *N. Y.*, 30, 83, 84.) The principle has also been applied to the non-payment of duties under the revenue laws of the United States. (*Meredith v. United States*, 13 *Peters*, 486.) In that case it was stated by Mr. Justice Story,

that importers of goods become by the act of importation personally indebted to the United States, for the duties due thereon. And he added that it was the opinion of the court, "that the duties due upon goods imported constitute a personal debt and charge upon the importer, as well as a lien on the goods themselves." (*Id.*, 493-4.)

The defendant's counsel still farther objected that even though that might be the law, an attachment could not regularly be issued to enforce the liability. And the case of *McCoun v. N. Y. Central R. R. Co.*, 50 *N. Y.*, 176, was relied upon as sustaining that proposition. But that case did not involve this point. The question there was simply as to the proper form of notice to be inserted in a summons in an action for the recovery of a penalty. And the court intimated a decided opinion that it should not be a notice that the plaintiff would enter judgment for the amount claimed, without an application to the court if the defendant failed to answer the complaint.

Very different considerations, required by the history and object of the section providing for what demands attachments may be issued, have been applied to its construction. To promote the efficiency of that remedy, it has been held to include actions on contracts for the recovery of even unliquidated damages, where a proper disclosure of the grounds of the claim supplies practicable means for determining its amount. (*Lawton v. Reil*, 34 *How. Pr.*, 465. *Clews v. Rockford & Co. R. R. Co.*, 2 *Hun*, 379.) And this demand is within the section, under that construction. It was also insisted that the attachment should be vacated because a preceding action for the same cause was commenced in the United States District Court for the southern district of New York. But that action is entitled to no such effect in this case, for the reason that no process in it was ever served upon the defendant, so that the court never ac-

quired jurisdiction over his person. And the attachment issued in it against his property was vacated before the seizure was made under that issued in this action. There was no other action pending when the motion was made to set aside the attachment in this case; and that was sufficient to defeat the objection based upon the existence of another suit for the recovery of the same demand. (*Averill v. Patterson*, 10 *How. Pr.* 85.)

There was nothing improper in that portion of the order made which directed the sheriff to open the safe and tin box containing the defendant's property. The process could be effectually served in no other way. It was the duty of the officer acting under it immediately to attach the real and personal estate of the debtor. And that could only be done by taking it into his custody, where the property was tangible in its character. (*Wait's Code*, 407, § 232, and note. *Haggerty v. Wilber*, 16 *John.*, 287. *Goll v. Hinton*, 8 *Abb.*, 120. *Smith v. Orser*, 42 *N. Y.*, 132.)

Neither the safe nor the tin box constituted any portion of the defendant's dwelling, and they were not within the protection which the law affords to that against an officer acting under civil process. They were simply places of deposit and safe keeping for the defendant's property, which the sheriff may enter to make the seizure required by law, in the execution of the process in his hands. If that were not so, there would be nothing to prevent a failing or insolvent debtor from turning all his property into valuable securities or other articles requiring but little space for their custody, and then placing them in the hands of a safe deposit company for preservation, and defying all the efforts of his creditors to satisfy their debts by resorting to them. That would form an expedient for the success of fraudulent devices, which might render the laws of the state for the collection of debts entirely powerless. No such effect could be given to a deposit of that nature without

United States v. Graff.

at once defeating the object plainly designed to be secured by the law in rendering the debtor's property liable to the process issued in favor of his creditors in actions brought to recover their just debts. Against that, his dwelling alone is secured against the intrusive action of the officer. And, that in no sense, can be so far extended as to include either the safe or tin box in the custody of the Mercantile Trust Company, for the defendant. A case has been presented on the points relied upon by the company's counsel, supposed to be in conflict with this conclusion. It arose under the laws of Pennsylvania. And it was there held that the company could not be required to furnish a certificate of the contents of the safe, because they were virtually in the possession of the lessee. It is not necessary to consider the point whether this decision was properly made; for if it was, then it is very clear that the only way in which the debtor's property, held in that manner, can be rendered liable to the owner's creditors, is by seizure under the attachment issued to the sheriff. If a certificate cannot be obtained showing the property so held for the debtor, and it cannot be seized under attachment or execution, then certainly the creditors are deprived of all ordinary means for applying it to the satisfaction of their debts. And an effectual mode would be at last discovered for enabling a debtor to withhold his property from his creditors. The law has not yet, and probably will not very soon, lend its aid to the success of such an expedient for the protection of a debtor's property against the clearly defined rights of his creditors.

The appeal of the Mercantile Trust Company certainly cannot be sustained.

The portion of the order from which the plaintiff has appealed was clearly right. Without it the obligation would rest upon the officer to prevent the process he was required to execute from being converted into an instru-

Demarest v. Wickham.

ment of investigation and discovery of the debtor's private papers. Such a use of it would be an abuse requiring the punishment of the officer permitting it to be done, under color of process delivered for an entirely different and lawful purpose. The order did no more than declare the duty of the officer, as the law defined it. It was a very proper exercise of the discretion of the court. And if any doubt shall arise in his mind as to its proper application and construction, he will be at liberty to apply to the court for more specific instructions.

The order should be affirmed, but, under the circumstances, without costs.

Order affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

DEMAREST and TONER vs. WICKHAM, Mayor of the
City of New York.

The act of 1878, (chapter 335,) abolishing the board of assistant aldermen of the city of New York from and after the 1st day of January, 1875, and transferring its powers and duties to the board of aldermen, was valid and constitutional.

The office being one whose duration was not provided for by the constitution, it was subject to the authority vested in the legislature, over all municipal corporations; and its duration could be declared by law, within the plain import of section 3, article 10 of the constitution.

Accordingly *held*, that votes cast for the plaintiffs, for the office of assistant aldermen, at the general election held in November, 1874, were mere nullities, the office having been abolished; and that it was the duty of the mayor to recognize the board of aldermen, solely, as the common council of the city, and to regard and consider all its official acts, within the limits of its prescribed authority, as valid and effectual.

APPEAL from order sustaining a demurrer to the plaintiffs' complaint, and from the judgment en-

Demarest v. Wickham.

tered pursuant to the same. (*S. C.*, *very briefly reported*, 4 *Hun*, 627.)

W. S. Wolf, for the appellants.

T. B. Clarkson, for the respondent.

By the Court, DANIELS, J. By section two of an act passed on the 30th of April, 1873, to reorganize the local government of the city of New York, it was declared that the board of assistant aldermen should be abolished from and after the 1st day of January, 1875. But, notwithstanding this provision, the plaintiffs presented themselves as candidates for the office of assistant aldermen of the city, at the general election held in November, 1874, and received the votes polled for such offices, which votes were received, counted, and proclaimed by the different inspectors of election within the limits of the districts in which they were respectively candidates, and every act essential to their election was performed, if those offices continued to exist. But no other candidates were voted for at the election in 1874, for the office of assistant aldermen, and consequently no organization of the board has since been effected. For that reason the plaintiffs insist that the legislative powers of the city are suspended and incapable of being exercised, and they brought this action to enjoin the defendant, as mayor, from signing or vetoing any resolutions, ordinances, appropriations or contracts, or any acts passed, enacted or done by the board of aldermen as the common council, and to require a special election to complete the board of assistant aldermen.

In the change provided for by the act of 1873, no attempt was made to deprive the city of the powers exercised by the board of assistant aldermen. But from and after the first of January, 1875, they were transferred to, and conferred upon, the board of aldermen, which

Demarest v. Wickham.

was declared to be the common council after that ; that was, to possess the powers and perform all the duties by law conferred or imposed upon the board of aldermen, assistant aldermen, the common council, or any one or more of them. (*Laws of 1873, p. 484, ch. 335, § 2.*) If this change were constitutionally made, then it is clear that the votes cast for the plaintiffs were mere nullities ; that the offices for which they were respectively candidates were abolished from the time when otherwise they might have entered upon the discharge of their duties ; that it is now the duty of the defendant, as mayor of the city, to recognize the board of aldermen, solely, as the common council of the city, and to regard and consider all its official acts, within the limits of the authority prescribed for its government and control, as effectual and valid. In that event, the case made by their complaint has no foundation, whatever, to stand upon, and they were justly defeated by the decision of the Special Term.

The constitution of 1846 was in full force when the act of 1873 was enacted, and that contained nothing by which the office of assistant alderman of the city of New York was continued in existence, independently of the power of the legislature over it. The office was one whose duration was not provided for by the constitution, and for that reason it could be declared and controlled by law, within the plain import of section three of article ten. And it was subject to the authority vested in the legislature over all municipal corporations. For that purpose it was sufficient that no restraint was imposed upon the powers of the legislature in this respect. Its authority over the office was unrestricted, except that during its continuance it could only be filled by election or appointment in the mode prescribed by section two of article ten of the constitution of 1846. Whether it should be continued or abolished, and its functions and powers conferred upon other municipal

Christopher and Tenth Street R. R. Co. v. Central Croestown R. R. Co.

officers of the city, was left unprovided for by that instrument. It was accordingly within the power and control of the legislature, whose authority over the office was complete as long as the constitution subjected it to no restraint. As to all subjects of that description, the power of the legislature is supreme and unlimited. This was distinctly held in the cases of the *Bank of Chenango v. Brown*, (26 N. Y., 467,) and *People v. Pinckney*, (32 *id.*, 377.) The provisions of the act of 1873, by which the office of assistant aldermen was abolished, and the powers exercised by the board of assistant aldermen were conferred upon the board of aldermen from and after the first of January, 1875, were clearly within the authority of the legislature over the city as a municipal corporation. And the plaintiffs' action, for that reason, cannot be maintained.

The judgment and order appealed from were therefore entirely right, and should be affirmed with costs.

Judgment accordingly. (a)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

(a) Affirmed by Court of Appeals. (See 68 N. Y., 320.)

THE CHRISTOPHER AND TENTH STREET RAILROAD CO. vs. THE CENTRAL CROSSTOWN RAIROAD CO.

The defendant's charter, granted March 28, 1873, authorized it to construct and use passenger railways, in the city of New York, through certain streets therein, and "through and along West street, with double tracks to Christopher street, at the foot of Christopher street, North river." The plaintiff's charter, granted April 25, 1873, authorized it to lay, construct and use a railroad for passengers in said city, through, upon and along certain routes therein specified, "commencing at Christopher street ferry, and running thence through and along Christopher street, with a single track to Greenwich avenue, * * thence through and along West street, with a single track to the Christopher street ferry, the place of beginning."

Christopher and Tenth Street R. R. Co. v. Central Crosstown R. R. Co.

- Held*, 1. That the defendant's charter conferred upon it the power to extend its track to the North river, at the foot of Christopher street.
2. That the plaintiff occupied no such relation towards the defendant, or the public streets, as entitled it to maintain an action to restrain the defendant from using the public streets.
3. That the rights conferred upon the plaintiff, by its charter, were not exclusive, and did not prevent the legislature from conferring authority to fix the terminus of the defendant's road at the North river, at the point designated.
4. Nor did it confer upon the plaintiff the power or duty of interfering to protect the public interest, either on behalf of the city or of the general public.
5. That if there was any excess of power in the claim of the defendant to run its track to Christopher street ferry, the public, alone, could interfere to restrain the defendant by injunction; unless it should be shown that some actual interference with the tracks as laid at that time, by the plaintiff, had occurred, or was about to be attempted.
6. That there were no sufficient grounds for the issuing of a preliminary injunction; and an order making the same absolute was reversed.

A PPEAL, by the defendant, from an order of the Special Term, making a temporary injunction absolute.

The defendant's charter, granted March 28, 1873, authorized it to lay, construct, operate, maintain and use passenger railways, in the city of New York, through, upon and along certain routes therein designated, and "through and along West street, with double tracks to Christopher street, at the foot of Christopher street, North river." (*Laws of 1873, ch. 160, § 1.*) The plaintiff's charter, granted April 25, 1873, authorized the plaintiff to lay, construct, operate and use a railroad for passengers, in said city, through, upon and along certain routes therein specified, "commencing at Christopher street ferry, and running thence through and along Christopher street, with a single track to Greenwich avenue, * * thence through and along West street, with a single track to the Christopher street ferry, the place of beginning." (*Laws of 1873, ch. 301, § 1.*)

The plaintiff obtained a temporary injunction to restrain the defendant from laying its tracks and running its passenger cars to the foot of Christopher street; which injunction was subsequently made absolute.

Christopher and Tenth Street R. R. Co. v. Central Crostown R. R. Co.

Simon Sterne, for the appellant.

Jno. M. Scribner, for the respondent.

DAVIS, P. J. We have withheld the final consideration of this appeal until the decision of the case on its merits, by the Special Term, before which it has been tried since the argument of the motion. The opinion of the Special Term is now before us. The decision of the Special Term is put wholly upon the construction of the defendant's charter. We have no doubt that the learned justice is entirely right in holding that the charter confers power on the defendant to extend its track to the North river, at the foot of Christopher street, and we concur in the conclusion arrived at on the merits. We are also of opinion that the plaintiff occupied no such relation towards the defendant or the public streets, as entitled it to bring this action to restrain the defendant from using the public streets. The rights conferred upon the plaintiff by its charter are not exclusive, and do not prevent the legislature from conferring authority to fix the terminus of the defendant's road at the North river, at the point designated. Nor does it confer upon the plaintiff the power or duty of interfering to protect the public interest, either on behalf of the city or of the general public. If there was any excess of power in the claim of defendant to run its track to the point in question, the public alone could interfere to restrain it by injunction, unless it should be shown that some actual interference with the tracks as laid at that time by the plaintiff had been done, or was about to be attempted.

There seems to us to be no sufficient grounds for the issuing of the preliminary injunction. Its continuance is, of course, disposed of by the decision at the trial denying a permanent injunction ; but as that does not necessarily determine that an injunction pending the suit might not

 Continental National Bank v. Adams.

have been properly granted, it is proper that we should dispose of the appeal from the order granting such injunction. We think the order appealed from should be reversed, with \$10 costs, besides disbursements, and the motion made below denied, with \$10 costs.

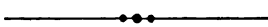
DANIELS, J., concurred.

BRADY, J. I think that the decision of this case on the merits, at the Special Term, disposes of this appeal in favor of the defendant. It appears from that judgment that the plaintiff was not entitled to the injunction granted. I concur, therefore, in the result.

Order appealed from reversed, and motion below denied. (a)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875. *Davis, Brady and Daniels*, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hum*, 630.



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THE CONTINENTAL NATIONAL BANK *vs.* ADAMS and another.

The aim and object of the court, in granting motions for a new trial on the ground of *surprise*, is to do justice.

Counsel are not obliged to disclose any features of the prosecution or defence, unless required by order of the court; but when either does so, to the other, the statement must be made in good faith, and if it be apparently otherwise, though not so in fact, or if it result in inducing a different line of preparation for the trial than would otherwise have been adopted, the burden must fall on the communicant, if there be reason to suppose that justice will be accomplished by applying the rule.

Where the plaintiff's attorney was led, by conversations with the defendant's attorney, to suppose that no serious defence would be interposed, and therefore omitted to summon a material witness; it was *held*, that although no deceit or fraud was intended by the defendant, yet as the acts of his representative did mislead the plaintiff, the discretion of the court was justly exercised in setting aside a verdict for the defendant and granting a new trial, on the ground of surprise.

APPEAL from an order made at Special Term setting aside a verdict in favor of the defendants, and granting a new trial on the ground of surprise.

Edward F. Brown, for the plaintiff.

William A. Jenner, for the defendants.

By the Court, BRADY, J. The application granted in this case rested upon conversations between the respective attorneys, by which the plaintiff's attorney was led to suppose that no serious defence would be interposed herein. The opinion given by Justice DONOHUE, on granting the motion, is as follows: "The defendants had a verdict at the trial of this cause, in substance, on the ground that the note was an accommodation one, and the discount had been at usurious rates. The plaintiff asks to set the verdict aside on the ground of surprise, stating that from what the attorney said when the answer was served, the defence was not really intended to be interposed. It is asserted, positively, that when the answer was served the attorney for defendants stated: "It was put in to enable Mr. Adams to obtain a little more time to arrange his affairs and settle the suit."

Again, the representative of the defendants, having failed to negotiate a settlement, said, but a short time before trial, to the plaintiff's representatives, "Then I suppose you must take your judgment."

The attorney for the plaintiff swears that he was misled by this into supposing no defence was intended.

The discount alleged to be usurious was not negotiated with the defendants, nor was the loan made them for his use or benefit. The note was given to, and discounted for, Barnard, and it is perfectly clear that Barnard was a competent witness on the subject, and evident, that if the plaintiff had supposed a defence was to be set up, he would have been a witness who could

Continental National Bank v. Adams.

throw light on the question, but, from the start, the plaintiff was misled by the statements of the defendants' attorney into supposing no evidence on the point necessary. No denial that relieves the case of doubt is made. A want of recollection is set up on the part of the defendants' attorney in answer to the sworn statement on the plaintiff's side, and while it may be fairly said no deceit or fraud was intended by the defendants, the acts of their representatives did mislead plaintiff.

The not very satisfactory evidence of the defendants, on the trial, and the sworn statement of Barnard on this motion, convince me, that at least the plaintiff, who has parted with its money on the faith of an apparently business note of the defendants, should have the right to try that question, fully prepared, and not acting on the statements which misled him. I think the cases cited by plaintiff fully sustained his right.

The cases alluded to, are *Jackson v. Warford*, (7 *Wend.*, 62,) *Chamberlain v. Lindsay*, (1 *Hun*, 231.) And see also, *Tyler v. Hoornbeck*, (48 *Barb.*, 198.) Motions of this character, said MILLER, J., in the last case, "are addressed very much to the sound discretion of the court, and if it satisfactorily appears that to promote the ends of justice an opportunity should be presented for the introduction of new testimony, the court will furnish it by setting aside the verdict and granting a new trial."

The surprise stated in that case was the plaintiff's attorney calling one of the defendants as a witness, in violation of a promise that he would not call him, and by which the defendant was unprepared to impeach him. The application was granted, although the affidavits were "somewhat conflicting." It was also declared, in that case, that the neglect of the defendant to ask that a juror be withdrawn should not operate to his prejudice. It was a failure to avail himself of a technical rule. The same observation must be made to the

 Gilman v. Redington.

defendants' objection here, that the plaintiff neglected to ask a similar favor from the court. The aim and object of the court in granting motions of this kind, is to do justice. The counsel for the parties are not obliged, as suggested by Justice DANIELS, in *Chamberlain v. Lindsay*, (*supra*,) to disclose any features of the prosecution or defence, unless required by order of the court; but when either does so, to the other, the statement must be in good faith, and if made apparently otherwise, though not so in fact, or if it result in inducing a different line of preparation for the trial than would otherwise have been adopted, the burden must fall on the communicant, if there be reason to suppose that justice will be accomplished by applying the rule. In this case, the discretion exercised at Special Term was justly employed, in all respects, and the order should be affirmed, with \$10 costs and disbursements. (a)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

(a) *S. C.*, reported very briefly, 4 *Hun*, 666.

GILMAN, executrix, &c., vs. REDINGTON and others.

On appeal from an order of a surrogate, the costs which may be awarded under section 318 of the Code, are only those which may be recovered in an action at issue on a question of law, from the time the proceeding is brought into this court, namely, \$20 for the argument, and \$10 for each term the appeal is necessarily on the calendar, exclusive of the term at which it is argued. The case of *Morgan v. Morgan* (1 *Ab.*, *N.S.*, 40,) approved.

A PPEAL, by the plaintiff, from an order of the Special Term, retaxing costs. (*S. C.*, briefly reported, 4 *Hun*, 640.)

Gilman v. Redington.

Wellesley W. Sage, for the appellant.

C. E. Whitehead, for the respondent.

By the Court, BRADY, J. The principles governing this appeal are well stated by MULLIN, J., in the case of *Morgan v. Morgan*, (1 Abb., N.S., 40,) and we accept the result arrived at in that case, so far as it goes. The learned justice did not consider whether the appellant was entitled to the term fees. Indeed the question was not presented to him. If the successful party is entitled to the sum of \$20 for the trial of an issue of law he is clearly entitled, under subdivision seven, of section 307 of the Code, to the term fees not to exceed five, for every term the appeal is necessarily on the calendar and not tried, &c.

Such a conclusion would assimilate the proceeding to that of an issue of law which goes upon the calendar to be called and considered at the Special Term.

If we depart from the views of Justice MULLIN, we must interpolate in the Code (section 318) the words "on appeal" after the words "an action at issue on a question of law." Such was not the intention of the legislature by the section named. It was, as the language of the section implies, designed to give only such costs on such proceedings in this court as were allowed in the class of issues specifically named, and only from the time such proceedings were brought into this court.

The right to costs begins from the time mentioned, and therefore the successful party is not entitled to any allowance for proceedings anterior to that time. The issue is framed in the court below, and is to be determined on the papers presented, as the question to be considered is one eliminated by such papers, and nothing can be added to them.

Having arrived at these conclusions, it follows that on appeals of this character the costs which may be

Mayer v. Mayor &c. of New York.

awarded under section 318 are only those which may be recovered in an action at issue on a question of law, from the time the proceeding is brought into this court, namely, \$20 for the argument, and \$10 for each term the appeal is necessarily on the calendar, and the disbursements.

The respondents are entitled, on these principles, to \$20 for the argument and \$20 for two terms fees.

The proceeding was on the calendar for three terms, but argued at the last of them, and no term fee is allowed, under the statute; for that term. The trial fee is then earned. (*Sub. 7, of sec. 307.*) The order made at Special Term must be modified to meet these views.

No costs to either party on this appeal.

Order modified and affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

BERNHARD MAYER vs. THE MAYOR &C. OF NEW YORK.

The owner of a city lot assessed for a street improvement, intending to pay the assessment thereon, by mistake paid an assessment laid upon an adjoining lot, not owned by him, which assessment was afterwards declared invalid and vacated. *Held*, that such owner could recover back the money so paid by mistake, (adopting and reaffirming the decision in *S. C.*, on demurrer, 4 *Thomp. & C.*, 488; 2 *Hun*, 306.)

An order of the court, vacating an assessment, is not admissible in evidence without the production of the roll or record of the proceedings in which the order was made.

But if the order is wholly immaterial, because the fact which it is received to prove is not essential to the plaintiff's right to recover, and the jury cannot be said to have been affected by the improper and illegal evidence, the error of receiving it will not be regarded.

APPEAL, by the defendants, from a judgment entered on a verdict.

Mayer v. Mayor &c. of New York.

The action was brought to recover back the amount of an assessment for a street improvement, which the plaintiff had paid to the defendant. The plaintiff being the owner of a lot assessed, attempted to pay the sum assessed thereon, but by mistake paid the assessment laid on an adjoining lot, not owned by him, and which assessment was subsequently vacated. (*S. C.*, *briefly reported*, 4 *Hun*, 673.)

D. J. Dean, for the appellant.

Neville & Andrews, for the respondent.

By the Court, DAVIS, P. J. The defendants demurred to the complaint in this action on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained at Special Term, and from the order of that court the plaintiff appealed to the General Term. This court, at the October term, 1874, reversed the order below, and held the demurrer bad, with leave to defendants to answer over. The opinion of the court, *per* BRADY, J., (2 *Hun*, 306; 4 *Thomp. & C.*, 488,) covers all the material questions presented by this. We adopt and repeat the opinion as a sound exposition of the law under the existing adjudications of the Court of Appeals. On the trial the plaintiff put in evidence an order of the Special Term of this court vacating, on the 21st of December, 1871, the assessment on lot ward number 27, on which the plaintiff paid the assessment on the 22d of December of the same year. This was objected to because the roll or record of the proceedings in which such order was made was not produced. The court overruled the objection, and received the order in evidence, to which the appellant duly excepted. This exception was probably well taken, but the order was wholly immaterial, as the fact which it

 People v. Daly.

was received to prove was not essential to the right to recover.

According to the ruling of this court already cited, it could make no difference with the plaintiff's right to recover, whether the assessment on lot 27 had been vacated or not. Besides, the court put the case to the jury upon a question in no sense involving or affected by the question whether the assessment had been vacated or not. The jury cannot be legally said to have been affected by the improper and illegal evidence.

There seems to be no reason for disturbing the judgment, and it should be affirmed. (a)

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

(a) Affirmed. (68 N. Y., 455.)

PEOPLE, *ex rel.* LEWIS and others, *vs.* DALY and others, judges of the Court of Common Pleas in New York.

Upon an application, by an insolvent and imprisoned debtor, to be discharged from imprisonment, the notice required by the statute (2 *Edm. Stat. at Large*, 29, § 4.) was, by the order made, directed to be published in two papers named, and was required to be given for the 6th of June, 1874, at 11 A.M. The publication of the notice, in one of the papers, was of an application to be made on the *third* of June. *Held*, that upon such a notice the officer had no right to grant a discharge.

That until the publication of the notice was made as directed, and proof of such publication was before the officer, he was without jurisdiction.

Held, also, that the right of the creditor to a *certiorari* in such a case, being positively given by the statute, the court had no right to withhold that remedy, notwithstanding the right of appeal from the erroneous order existed.

CERTIORARI to remove proceedings in the New York Common Pleas for the discharge of Isaac

People v. Daly.

Goldstein, an insolvent and imprisoned debtor. (*S. C.*, *briefly reported*, 4 *Hun*, 641.)

James R. Adams, for the relators.

H. Morrison, for the respondents.

By the Court, DONOHUE, J. Isaac Goldstein, an insolvent and imprisoned debtor, applied to the respondents, judges of the Court of Common Pleas in New York, for a discharge of his person from imprisonment. On the day the order to show cause was returnable, there being no opposition, the order was granted. The proceedings were removed into this court, *by certiorari*, in pursuance of the statute. (2 *Edm. Stat. at Large*, p. 50, § 47.)

The relator seeks a reversal, on various grounds; the first of which is that the notice, directed by the 4th section of the act, (*Id.*, p. 29,) was, by the order of the judge, to be published in the Daily Register, and in the Albany Evening Journal, and was directed to be given for the 6th of June, 1874, at 11 A.M.; that in fact the publication of the notice in the Daily Register was of an application to be made on the 3d of June, 1874, at 11 A.M., and so the proof before the officer discloses the fact to be.

The relator contends that until the publication of the notice was made as directed, and proof of such publication was before the officer, he was without jurisdiction; and such would seem to be the clear rule, as laid down in 16 *Barb.*, 316. There is no question as to the fact, and it seems equally clear, on the law, that the relator has never had his day in court; and the officer acted without jurisdiction in attempting to dispose of his rights.

It is claimed, on the part of the respondents, that the relators having the right of appeal in the Common

Pleas, the remedy by *certiorari* should be denied them. The statute (2 *Edm. Stat. at Large*, 50, § 47,) is positive as to the relator's rights, and the court has no right to withhold what the statute gives to a party.

The proceedings should be reversed, and the discharge vacated.

Ordered accordingly.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Daniels and Donohue, Justices.]

SWEET vs. TITUS and another.

It is well settled that the delivery of a check is not a payment, unless there be an agreement to that effect, or unless the drawer, in consequence of some *laches* on the part of the holder, has sustained loss or injury in respect thereof, and then only *pro tanto*.

A creditor is not bound to accept a check, even if it be for the entire amount of his claim.

Nor is he bound to receive money. He may, although it be sent to him, refuse to accept it, and leave the debtor to his plea of tender, when sued for the claim.

He may do this, even though, having received the money, he keeps it subject to the order of the debtor. The latter must withdraw the money, and plead tender, and thus save himself from the costs of the controversy.

The defendants being indebted to the plaintiff in the sum of \$89.29, the proceeds of a consignment of produce sent to them for sale, sent their check for that amount to the plaintiff, with an account of sales. The plaintiff refused to accept the check, claiming that the defendants were indebted to him for balances on former shipments. He did not return or use the check, but held the same subject to the order of the drawers, and offered to surrender it, on the trial. *Held*, that the referee was correct in holding that the check was not a payment *pro tanto* of the plaintiff's claim.

APPEAL, by the defendants, from a judgment entered on the report of a referee. (*S. C.*, *briefly reported*, 4 *Hun*, 639.)

Sweet v. Titus.

J. H. & W. L. Van Derzee, for the appellants.

E. E. Harding, for the respondent.

By the Court, BRADY, J. The plaintiff sent several packages of produce to the defendants to sell on commission. The last shipment was in the month of January, 1872. The chief controversy, however, relates to a consignment of butter, made in December, 1871, the proceeds of which, after deducting expenses and commissions, amounted to \$89.29, and for which amount, with the account of sales, the defendants transmitted their check to the plaintiff. The parties, although such was not always the course of dealing, had sometimes closed kindred transactions by check which was sent and accepted. The plaintiff was dissatisfied with the result, as stated, the butter having cost him thirty cents per pound, and having been sold for twenty-two cents. He wrote the plaintiff, by his attorney, on the subject, and claimed not only that he should be paid at the rate of thirty-three cents per pound for his butter, but also that the defendants were indebted to him for balances on former shipments. He said, in reference to the check for \$89.29, that if the defendants would pay him the sum demanded by him, deducting the amount of the check, and return his butter pails free of charge, it would be satisfactory—otherwise he would return the check and commence legal proceedings. The defendants did not comply with the requisitions of this letter, and the plaintiff commenced his action. He did not return the check, or use it. He kept it, and offered to surrender it on the trial. The defendants refused to receive it. The referee found that there was a small balance due over and above the check, but that the check was given for all that the plaintiff was entitled to recover for the merchandise to which it related. The

sum of \$89.29, in other words, covered the proceeds of the butter, less expenses and commissions.

The evidence fully warranted these results, and the only question, therefore, which we are called upon to consider is, the refusal of the referee to regard the check as a payment, *pro tanto*, of the plaintiff's claim. It seems to be well settled that the delivery of a check is not a payment, unless there be an agreement to that effect, or unless the drawer in consequence of some laches on the part of the holder has sustained loss or injury in respect thereof, and then only *pro tanto*. (*Syracuse, Binghamton and New York R. R. Co. v. Collins*, 3 *Lansing*, 29, and cases cited. *Hill v. Beebe*, 13 *N. Y.*, 586. *Bradford v. Fox*, 38 *id.*, 289.) The creditor is not bound to accept a check, even if it be for the entire amount of his claim. He is not bound to receive money. He may, although it be sent to him, refuse to accept it, and leave the debtor to his plea of tender, when sued for the claim. He may do this even though having received the money he keeps it subject to the order of the debtor. The latter must withdraw the money and plead a tender, and thus save himself from the costs of the controversy. (*The Kingston Bank v. Gay*, 19 *Barb.*, 459.) While the creditor has his rights, the debtor is not without corresponding advantages. If he choose to absolve himself from a debt due, he must tender the amount of it; and having done so, if the creditor refuse to receive it, the latter must take the consequences of his obstinacy. It may be that a court of equity would compel the creditor, in a proper case therefor, to discharge an incumbrance; but that is not this case. Applying these principles to the case in hand, the conclusion must be that the referee was correct in holding that the check was not a payment. The plaintiff refused to accept it, and held it subject to the order of the defendants. They suffered no loss by that circumstance. The evidence shows that it was good

Manton v. Poole.

from the time it was given until the time of the trial. If the defendants wished to make it absolute they should have demanded its return, and if the plaintiff had refused to comply, the finding that it was accepted would have been warranted. They did not do so. There is nothing in the form of the complaint which militates against this proposition. The averments therein are general, of certain causes of actions, and no credit is given for the check received. The plaintiff's letter, written for him by his attorney, contemplates a credit for it, provided the defendants acquiesced in his claims; but they did not do so, and he made no use of the check, as already suggested.

The result of these considerations must be, for the reasons assigned, that the judgment should be affirmed.

Ordered accordingly, with costs.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

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67h 304
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MANTON vs. POOLE and others.

To entitle a party to an attachment, a reasonably plain case must be made out.

The existence of a cause of action must be shown.

The affidavit should contain a statement of the facts out of which the claim arose; and they should appear to warrant the conclusion or claim deduced from them. A statement of its amount, without facts justifying the conclusion, does not comply with the requirements of the Code.

A mere recital of facts, without a direct statement of the existence of any of them, is insufficient.

Where the action is to recover damages for the breach of an agreement, so much of the agreement as contains the obligation relied upon as the foundation of the action should be plainly and positively disclosed in the affidavit for an attachment; and it should then be shown, with equal directness, in what respect there has been a failure of performance, and how, and to what extent, the plaintiff has been injured, by means of it.

Manton v. Poole.

APPEAL from an order denying a motion to set aside an attachment. (*S. C., briefly reported, 4 Hun, 638.*)

James C. Carter, for the appellants.

John S. Washburn, for the respondent.

By the Court, DANIELS, J. In order to entitle a party to an attachment for the seizure of his debtor's property, a reasonably plain case is required to be made out. And an indispensable circumstance to make it out is the existence of a cause of action. For that purpose the Code has required that it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim, and the grounds thereof, (§ 229.) The affidavit made by the plaintiff, on which the attachment in this case was issued, wholly failed to comply with this requirement. It did not appear from it that any cause of action existed in his favor. To show that, the affidavit should have contained a statement of the facts out of which the claim was supposed to have arisen. They were the grounds which the statute provides shall be stated. And without them it cannot appear that a cause of action exists in the plaintiff's favor. For that purpose it would be clearly insufficient for the party to state, merely, that he has a cause of action. That would not show its existence, as the law provides it shall be disclosed before an attachment can be issued in the action. It would simply be the plaintiff's conclusion. And nothing more than that was set forth in the plaintiff's affidavit. It did not show that the defendants had entered into a covenant, or agreement with him, which they had failed to perform, or anything from which it could be logically inferred that any assignable amount of damages had been sustained by any such non-performance.

Manton v. Poole.

The affidavit set forth, only by way of recital, that the defendants were indebted to the plaintiff in the sum of \$20,000, and that the grounds of the claim were the breach and violation by the said defendants of the covenants, agreements and conditions on their part to be kept and performed, contained in a certain agreement and patent license, duly made on or about the 26th day of August, in writing, under seal of that date, duly executed by and between deponent, this plaintiff, as party of the first part thereto, and said defendants as parties of the second part thereto, and particularly the breach and violation by said defendants of their covenant and agreement therein contained, to use all proper and reasonable efforts, by the employment of agents and canvassers, and by advertising, to make sale of the boilers in the territory, in and as in said agreement and license specified and provided, and to make the patent therein specified remunerative to this plaintiff, said party of the first part thereto, to the damage of the said plaintiff, said sum of \$20,000. And that was all that was stated for the purpose of showing the grounds of the claim, or the existence of a cause of action. It may all be true except the claim of the amount mentioned, and yet the plaintiff be entitled to recover nothing. It was a mere recital of facts without a direct statement of the existence of any of them, beyond the execution of the agreement referred to. That it contained any covenant or stipulation, by which the defendants really bound themselves to do anything for the plaintiff was not set forth as a matter of fact; nor in what respects they had failed to perform, if any such failure actually existed.

In a case of this description, so much of the agreement as contains the obligation relied upon as the foundation of the action, should be plainly and positively disclosed; and it should then be shown with equal directness in what respect there has been a failure of performance, and how and to what extent the plaintiff

Germania Bank v. Distler.

has been injured by means of it. Nothing less than that can adequately protect defendants against unjust or oppressive seizure of their property by attachment. The facts must be stated, and they should appear to warrant the conclusion, or claim, deduced from them. A statement of its amount, without facts justifying the conclusion, does not comply with what the Code has required in this respect.

The plaintiff's statements would have just as well sustained a claim of \$100,000 as one of \$20,000. The facts in the affidavit should appear to sustain the claim made upon them, before the plaintiff can be entitled to an attachment upon it. That was not the state of the case made in this action; and for that reason the order should be reversed, with ten dollars costs, besides disbursements, and an order made setting aside the attachment, with ten dollars costs of motion.

Order reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

GERMANIA BANK OF THE CITY OF NEW YORK vs.
DISTLER.

In an action upon a promissory note, the complaint alleged that the note was dated in 1872 by mistake, and that it was designed to have been dated in 1871. The answer denied these allegations, and the parties went to trial on this and another issue. *Held*, that by answering the allegations, the defendant practically conceded their sufficiency for the trial of the fact of mistake. That it was too late for him, after the trial was actually commenced, to object that the statement in the complaint was defective; and that it was the duty of the court to overrule an objection to the evidence offered to prove the mistake.

The date of an instrument in writing is only presumptive evidence of the time of its actual execution; and whenever fraud or mistake is alleged, this presumption may be contradicted by parol evidence.

Germania Bank v. Distler.

A mistake in the date of a promissory note may be asserted as well by an indorsee as by the payee; the entire title being transferred by the indorsement.

APPEAL, by the defendant, from a judgment entered on the verdict of a jury. (*S. C.*, reported briefly, 4 *Hun*, 633.)

Dailey & Perry, for the appellant.

Geo. W. Carpenter, for the respondent.

By the Court, DANIELS, J. This action was upon a promissory note, made by the defendant, payable to the order of Altenbrandt Brothers, and by them indorsed to the plaintiff. It was dated on the 18th of December, 1872, and was due in three months after its date. The complaint alleged that the note was dated in 1872 by mistake, and that it was designed to have been dated in 1871. The answer denied these allegations, and the parties went to trial on this and another issue in the cause not now requiring any consideration. It was objected by the defendant, that the alleged mistake could not be shown by the plaintiff, nor under the pleadings. If evidence of its existence could be shown by the payees, it would seem to follow from the indorsement, by which the entire title was transferred, that the plaintiff acquired the same right. It was an incident of its interest in the note, and could be asserted by the plaintiff if the fact itself could be shown to exist. The allegation in the complaint, that the note was by mistake dated in 1872, when the year should have been 1871, was very concisely and directly made in the complaint. And that the mistake relied upon was a mutual one, may reasonably be inferred from what was stated. For the purpose of correcting and reforming a written instrument in equity, it would probably have been insufficient, by way of answering a motion to have the pleading made more definite and certain. But after an answer taking issue

upon the fact itself, that objection could no longer be made. By answering the allegations, the defendant practically conceded their sufficiency for the trial of the fact. And it was too late for him to object to the defective nature of the statement, made when the trial was actually commenced. He had accepted that issue, and could not be misled by the proof given to sustain it; and it was the duty of the court to overrule the objection to the evidence offered to prove it, as was done at the trial. That it was proper to allow evidence to be given to prove the mistake, seems to be equally as free from doubt. In *Drake v. Rogers*, (32 *Maine*, 524,) which was an action upon a note, an amendment was allowed to be made by the plaintiff, stating the note to have been made in 1842 instead of 1841, the year of its date. And proof was received to establish the fact in favor of the indorser, who had purchased it. Upon a review of the case, both the amendment and the proof given in support of it were held to be proper. This is a direct authority against the defendant. In *Parsons on Bills and Notes*, it is stated as the law, that "the date will be *prima facie* evidence of the time when the note was made, but not conclusive." (*Vol.* 1, 41.) In *Draper v. Snow*, (20 *N. Y.*, 331,) SELDEN, J., stated in it to be the law, that whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol, not merely to supply an omission, where the paper itself is without date, but in opposition to the date, where it contains one. The time when a contract is executed is no more a part of the contract, than the place where it is executed. (*Id.*, 333.) The same thing was held in *Breck v. Cole*, (4 *Sand.*, 79,) in which DUER, J., delivering the opinion of the court, stated that, "the date of an instrument in writing is only presumptive evidence of the time of its actual execution; and it is settled and familiar law that this presumption, whenever fraud or mistake is alleged, may be contra-

Germania Bank v. Distler.

dicted by parol evidence. (*Id.*, 82. 2 *Phil. Ev.*, 660, and cases cited in note.) The evidence tended to show that the note was given for malt sold to the defendant by the payees, Altenbrandt Brothers, in 1871, on three months' time; that it was given on the 18th of December, of that year, and was protested for non-payment at the expiration of three months from that time. After that, Henry Altenbrandt went with the defendant to see the cashier and president of the bank, and requested that three months' more time should be given him for payment, but that was declined. This was as early as April, 1872, and no claim was then made that the note had not become due. From these facts the jury could very well conclude, as they did, that the mistake of a year had been made in the date of the note, and that it was mutual in its nature; particularly as no evidence whatever was given by the defendant tending to controvert that view of the facts. Exceptions to evidence offered to show that the note was in fact made in 1871; that the payees were not dealing in malt in 1872; and of the time when the note was delivered to the plaintiff's attorneys for collection, are relied upon in support of the appeal. But these were circumstances tending to show the existence of the mistake, and the plaintiff was at liberty to prove that, under the issue. The exceptions are without merit, and must be overruled.

The case was properly disposed of at the circuit, and the judgment appealed from should be affirmed.

Judgment affirmed. (a)

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875. *Davis, Donohue and Daniels*, Justices.]

(a) Affirmed by Court of Appeals. (See 64 *N. Y.*, 642.)

COFFIN vs. THE CHICAGO NORTHERN PACIFIC CONSTRUCTION COMPANY, impleaded, &c.

The plaintiff was a resident of this state, and the defendant was a corporation, formed and existing under the laws of Wisconsin. The object of the action was the sale of certain bonds, delivered by the defendant as collateral security for the payment of promissory notes made by it. *Held*, that this court had jurisdiction of the action.

By the terms of the agreement under which the bonds were transferred as security, the transferees, in case of any default in payment by the corporation, were authorized to sell the bonds, at public auction, in the city of Chicago, on giving the notice specified. *Held*, that this stipulation simply conferred the right, and prescribed the mode in which a sale could be summarily made, without either expressly, or by necessary implication, excluding other lawful proceedings for the attainment of the same object.

Accordingly *held*, that the agreement did not place the security beyond the power of courts of justice to dispose of it by their judgments, for the purpose of applying the proceeds to the payment of the debt secured thereby.

Held, also, that the bonds having been transferred to secure the payment of negotiable promissory notes, they, as incidents of the notes, would pass to any person receiving them in the ordinary course of business; and that a holder thereof residing in another state was not bound to keep them in the city of Chicago, or return them to that place, in order that a sale of them should be made there.

Where it appeared that a cause of action existed, under the laws of another state; that the defendant (a corporation) had property within this state; that neither the corporation, nor any of its officers, could be found within this state; that the corporation had its office in Chicago; and that none of its officers resided, or could be found, within this state; *held*, that these facts were sufficient to warrant an order for the service of the summons by publication.

A PPEAL, by the plaintiff, from an order vacating an order made for the publication of the summons. (*S. C.*, briefly reported, 4 *Hun*, 625.)

Edmund Coffin, Jr., for the appellant.

Henry Day, for the respondent.

By the Court, DANIELS, J. There is nothing in the position taken by the counsel for the appellant, that the justice making the order for publication could not

Coffin v. Chicago Northern Pacific Construction Co.

afterwards vacate it. Orders improvidently or inconsiderately made can always, as they should, be vacated or modified by the justice making them. Besides that, the power has been expressly conferred by the Code, (§ 324.) This case must therefore be disposed of upon the point whether, upon the facts appearing, the order was properly set aside.

The respondent's counsel claims that it was, because the court has no jurisdiction of the subject-matter of the action. The plaintiff resided in this state, at the time when the action was commenced, and the principal defendant was a corporation formed and existing under the laws of the state of Wisconsin. And the object of the action was the sale of certain bonds delivered by the corporation as collateral security for the payment of promissory notes made by it. Over such an action there can be no doubt as to the jurisdiction of this court, under the general terms of the statute relating to suits against foreign corporations. (*Code*, § 427.)

By the terms of the agreement under which the bonds were transferred as security, it is stipulated, that in case the party of the first part (the corporation) shall neglect or refuse to pay said notes, above mentioned, or either of them, or any part thereof, according to their respective tenor and effect, the said parties of the second part (the plaintiff's assignors,) their heirs, executors, administrators or assigns, shall have the right to sell said bonds at public auction, in the city of Chicago, upon giving notice of the time and place of such sale, by the publication of a notice thereof in a daily newspaper published in the city of Chicago, at least thirty days prior to such sale, and also by giving to the party of the first part at least thirty days' notice in writing of the time and place of such sale. This stipulation simply conferred the right, and prescribed the mode in which a sale could be summarily made, without either expressly, or by rea-

Coffin v. Chicago Northern Pacific Construction Co.

sonable implication, excluding other lawful proceedings for the attainment of the same object. And for that reason it did not place the security beyond the power of courts of justice to dispose of it by their judgments, for the purpose of applying the proceeds to the payment of the debt intended to be paid by means of them.

In this respect it was analogous to the power of sale contained in a chattel mortgage or security by law to pledgees of personal property, which have not been considered sufficient to supersede the jurisdiction of courts of equity over such transactions, notwithstanding the fact that sales may be made summarily, on notice reasonable in its character, or in conformity to the power created, still the courts, in a proper action for that purpose, will dispose of the security by virtue of their decrees, and apply the proceeds to the extinguishment of the debt. (*Vaupell v. Woodward*, 2 Sandf. Ch., 143, 145. *Stearns v. Marsh*, 4 Denio, 227. *Brownell v. Hawkins*, 4 Barb., 491.)

There was nothing in the agreement creating the security by which the creditors receiving it were bound to keep the bonds in the city of Chicago. They were transferred to secure the payment of negotiable promissory notes, and, as incidents of them, would pass to any person or persons receiving them in the ordinary course of business. And from that circumstance it must have been designed that their locality might be changed in that way, and consequently that they might be lawfully found in some other place than Chicago. And in the event of such a change, no obligation was attempted to be imposed on the party entitled to payment out of the security to return the bonds to that place, in order that a sale of them should be made there.

The affidavit of the attorney of the company stated that if the bonds had been brought within this state, it had been done contrary to the agreement under which

Coffin v. Chicago Northern Pacific Construction Co.

they were delivered, and in fraud of the rights of the company. But no facts are disclosed from which it can be inferred that they were fraudulently brought into this state; and there is nothing in the agreement which could be contravened or violated by an act of that nature. The fact, on the other hand, appears to be that the note in suit was lawfully and properly transferred to the plaintiff, with the bonds placed in the hands of his assignors as security for its payment. The case made in his favor is plainly one over which this court has jurisdiction.

The order of publication was made upon the sworn complaint in the action and the affidavit of the plaintiff's attorney. And from them it clearly appeared that a cause of action existed under the laws of another state, and that the defendant had property within this state. It was then positively stated that neither the corporation nor any of its officers could be found within this state, and that the attorney had been informed by one of the defendants, and a stockholder in it, that the corporation had its office in the city of Chicago, and that none of its officers resided, or could be found within this state. That did show, as the defendant to be proceeded against was a corporation having its officers in another state, that it could not, after due diligence, be found within this state, so that service of the summons could be made upon it here, by delivering it to one of its officers. And that, with the other facts established in the plaintiff's favor, sufficiently warranted the order made for its publication.

The case was not as strong as it might have been made; but under the authorities, as well as the language made use of in the Code, it entitled the plaintiff to the order allowing the summons to be served upon the corporation by publication. (*Code*, § 135. *Van Wyck v. Hardy*, 39 *How. Pr.*, 392. *Von Rhade v. Von Rhade*, 2 *Thomp.*

Dinsmore v. Mayor &c. of New York.

& Cook, 491.) The order vacating that order should therefore, be reversed, with \$10 costs, besides disbursements.

Order reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 8, 1875.
Davis, Brady and Daniels, Justices.]

DINSMORE and others vs. THE MAYOR &c. OF THE CITY
OF NEW YORK.

A complaint alleged that the plaintiffs performed work, labor and services for and at the request of the defendants, their agents and servants, in printing and advertising for them in a newspaper named. The defendants, by their answer, denied that they requested or employed the plaintiffs to print or publish the notices, &c., and set up other matters as an answer and as a further and separate defence. *Held*, that the denial struck at the very foundation of the plaintiffs' case, and could not be stricken out as frivolous; as it created an issue which called for investigation, and the affirmative of which it was incumbent on the plaintiffs to establish.

APPEAL from an order striking out the defendants' answer as frivolous. (*S. C.*, reported briefly, 4 *Hun*, 643.)

E. D. Smith, for the appellants.

S. P. Dinsmore, for the respondents.

By the Court, BRADY, J. The plaintiffs alleged that they performed work, labor and services for and at the request of the defendants, their agents and servants, in printing and advertising for them in a newspaper called "The Stockholder." The defendants, by the first paragraph of their answer, deny that they have requested or employed the plaintiffs to print or publish the notices

Van Etten v. Troudden.

and advertisements named in the complaint and specified in the bill of particulars.

In addition to this denial, which it will be perceived is general and specific as to the first essential element of the plaintiffs' case, namely, employment, there are matters set up as answer and as a further and separate defence. It is not necessary, however, to particularly refer to them. The denial recited strikes, as suggested, at the very foundation of the plaintiffs' case, and could not be stricken out as frivolous. It created an issue which called for investigation, and the affirmative of which it was incumbent on the plaintiffs to establish.

The order made at Special Term should be reversed, with \$10 costs and disbursements.

Order reversed.

[FIRST DEPARTMENT, GENERAL TERM at New York, May 3, 1875.
Davis, Brady and Daniels, Justices.]

VAN ETTEN vs. TROUDDEN and CHARLTON.

The plaintiff held a note made by T. and indorsed by C.; and the firm of C. & Co. being indebted to T., there was an understanding between the plaintiff and those parties that the firm might make payment to the plaintiff; which payment, when made, should apply on such note. Afterwards, C. & Co. gave the plaintiff, first, a check post-dated, and then a note payable in one month, for the amount of T.'s note. Such check and note were received by the plaintiff, not in payment or satisfaction of T.'s note, but merely as collateral to it. In an action upon the T. note, *held* that if T. consented that the firm check and note should be taken as collateral, the defendants could not urge, as a defence, the extension of the time of payment, given by such note and check.

And, there being evidence tending to show that the transaction with C. & Co. was with T.'s consent and approval, and the jury having found a verdict in favor of the plaintiff; *held* that, giving full effect to such verdict, the note of T. remained in full force against both maker and indorser.

That T. & Co. were the principal debtors, and the plaintiff was, at all times, at liberty to pursue them, on their liability thereon; and his right of action was not suspended by reason of his holding the note of third persons, on

Van Etten v. Troudden.

time, as collateral. That he might enforce his remedy on the principal security, notwithstanding the collateral was not due.

Held, also, that the mere acceptance, by the plaintiff, of the firm note on time, as collateral, without any agreement to suspend the right of action on the principal debt, would not extend the time of payment of such debt.

Held, further, that had it been proved that the plaintiff agreed to accept C. & Co. for the payment of the note in suit, that firm having T.'s money to that amount, it would have operated as an extinguishment of the plaintiff's claim. That although it would not have been technically payment, it would have discharged the debt, by way of accord and satisfaction.

And that if it had appeared that that defence was withheld from the jury, by the ruling of the judge, it would be held error.

If, when a copy of a paper is offered in evidence, a party intends to raise the objection that the original should be produced, that ground of objection should be specifically stated, in order that it may be removed by further proof. A mere general objection to the reading of the paper should be disregarded.

THIS case came before the court on an appeal from an order denying a new trial on the minutes of the judge; and on a case and exceptions. It seems that judgment was entered; but it was said by counsel that this was allowed only as security; and no appeal from the judgment appears in the papers. The case was therefore considered as an appeal from the order denying a new trial on the minutes, and on the case and exceptions, as if ordered to be heard in the first instance at General Term.

The action was against Troudden, as maker, and Charlton, as indorser, of a promissory note. The defendants, as a defence, set up payment; also that the plaintiff accepted a third party, (the firm of James A. Charlton & Co.,) as principal debtor for the note, and extended the time of payment with such third party without their consent or knowledge, by reason of which they were discharged from liability.

There was no evidence of payment, except as it was claimed that the dealings between the parties and the firm of Charlton & Co. operated as such; and the case was litigated on the hypothesis, on the part of the de-

Van Etten v. Troudden.

fendants, that those dealings discharged them either by way of payment, or on the ground of an extension of the time of payment without their consent.

On all the evidence the jury found in favor of the plaintiff. Various exceptions were taken in the course of the trial, and to the charge of the judge, and to his refusals to charge, which, with such portions of the evidence as is necessary to an understanding of the case, are referred to in the following opinion.

J. E. Van Etten, for the plaintiff.

A. Schoonmaker, Jr., for the defendants.

By the Court, BOCKES, J. The firm of Charlton & Co. was indebted to Troudden ; and it is shown very clearly that there was an understanding between the plaintiff and those parties, that the firm might make payment to the plaintiff ; which payment, when made, should apply on the note in suit. This is conceded by the counsel for both parties. But the question remained, whether such understanding amounted, on the evidence, to a valid binding agreement, that the firm should become the principal debtor. The proof shows that the firm gave the plaintiff a check post-dated, and subsequently a note payable one month from date, in its place, covering the amount of the note in suit ; but it is insisted, on the part of the plaintiff, that they were taken as collateral to the note, and not as payment, and that Troudden so understood the matter and gave his assent thereto.

If this be as is claimed by the plaintiff, the case is relieved from all difficulty. If it be true that the check and firm note were taken as collateral to the note in suit, with Troudden's consent, he can have no ground of complaint when called on to respond on his own note, nothing having been realized by the plaintiff on the collateral. Then how stands the case on the facts? And,

Van Etten v. Troudden.

1st, were the check and firm note taken as collateral to the note in suit? This question has been determined by the jury in favor of the plaintiff. Nor can it be said, with propriety, that the verdict is against, or unsupported by, the evidence. Even on the proof submitted on the part of the defendants, the case was not made so clear but that the question was one for the jury. But the evidence on the part of the plaintiff flatly contradicted the case claimed to have been made by the defendant. The case was therefore for the jury on all the evidence; and it must be now considered as a settled fact, that the check and firm note were received by the plaintiff as collateral to the note in suit, and not in payment or satisfaction of it. Indeed, I am of the opinion that the weight of evidence is, manifestly, to that effect.

If the defendant Troudden consented that the check and note should be taken as collateral, he cannot urge the extension of the time of payment given by them as a defence in this action. His consent is an answer to that defence. And there certainly was evidence tending to show that the entire transaction with the firm of Charlton & Co. was with Troudden's consent and approval. If John E. Van Etten's testimony was credited by the jury, they might well find that the arrangements and dealings with that firm in regard to its indebtedness to Troudden, had the latter's entire sanction. If, therefore, we give due effect to the verdict of the jury, as I think we are bound to do, the note in suit remained in full force against both maker and indorser. The defendants were the principal debtors, and remained so as regards this note in suit; and the plaintiff was at all times at liberty to pursue them on their liability thereon. His right of action on the note was not suspended by reason of his holding a note on time as collateral. Notwithstanding the collateral was not due, he might enforce his remedy on the principal security. (*Cary v. White*, 52 N. Y., 138.)

Van Etten v. Troudden.

It follows that the plaintiff is entitled to have judgment on the verdict, unless some error was committed on the trial, in the admission or rejection of evidence, or in the manner in which the case was submitted to the jury.

The plaintiff proved by John E. Van Etten, who acted as his agent in the transaction, that he, John E., gave Troudden at one time a paper or memorandum showing that the firm note was held as collateral. The witness said that he kept a copy of it, and produced it. To the reading of this memorandum the defendant's counsel objected; but the court overruled the objection, and the defendant's counsel excepted. The plaintiff had a right to show the delivery of such paper to the defendant Troudden. If accepted by him without then, or at any time afterwards, calling attention to any error of statement therein, such fact was an important one in the case. This fact the plaintiff had a right to prove. It was competent for him to show the delivery to Troudden of the paper containing such statement. If objected to on the ground that the original should be produced, that ground of objection should have been stated. But the objection was general, to the reading of the paper. Had the specific ground of objection been stated, *non constat*, but that it would have been removed by further proof. The general objection here interposed was insufficient. The defendant should have pointed out the specific ground of objection, and thus called the attention of the court and of the adverse party to the precise point on which he relied. Without this the objection may be disregarded. (5 Barb., 398. 6 id., 330. 39 id., 469. 49 N. Y., 588. 50 id., 392.) But the paper read was a sworn copy; and, besides, at a subsequent stage of the trial it was put in evidence without objection.

It is urged that that the court erred in holding that "the mere giving or taking of a check or note by a third party as collateral, does not of itself extend the time of

Van Etten v. Troudden.

the principal debtor." The ruling as applicable to this case was to this effect: that the mere taking of the check or note of Charlton & Co. as collateral, did not of itself extend the time of payment as to the defendants, on the note in suit. This ruling was correct. Admitting that the firm note was received as collateral to the note in suit, and that there was no agreement suspending the right of action on the latter, the mere acceptance of the firm note on time, being the note of a *third party*, would not extend the time of payment on the principal debt.

If a creditor accept the debtor's own note on time, while it will not generally extinguish the original debt, yet it will operate to extend the time of payment until the note becomes due; and there are cases holding that such extension will discharge a surety for the original debt, if it be without his consent. (*Place v. McIlwain*, 38 N. Y., 96, and cases there cited.) But in *Elwood v. Deifendorf*, (5 Barb., 398,) it was held that the taking of a new security from the principal debtor for an old debt past due, payable at a future day, without an agreement to extend the time of payment, does not discharge the surety; and in the very recent case of *Cary v. White*, (52 N. Y., 138,) it was held that the mere taking of collateral security on time is not, *per se*, and in the absence of any agreement beyond it, an extension of time for the payment of the original debt. In that case, ALLEN, J., examines this subject at length, and cites numerous authorities, rendering it impertinent here to do more than to refer to his elaborate and able opinion.

There was no error in this ruling of the learned judge; and it follows, from this conclusion, that there was no error in his refusal to charge, as requested in the subsequent paragraph, to wit, that the taking of the check post-dated, and of the firm note on time, and holding and acting upon them as the plaintiff did, was in fact

Van Etten v. Troudden.

an extension of the time of payment of the note in suit. (*Cary v. White, supra.*) Nor was there error in the refusal of the court to charge that "by the arrangement between Troudden and the firm of Charlton & Co., which was communicated to Mr. Van Etten, said firm became the principal debtor to Van Etten." Whether there was an arrangement between Troudden and the firm, what it was, and whether the firm thereby became the principal debtor to the plaintiff, were matters for the jury, and were in fact properly left to the jury.

There is another point of alleged error. The defendants' counsel requested the court to charge the jury that if they should find that the plaintiff agreed to accept the firm of Charlton & Co. for the payment of the note in suit, that firm having Troudden's money to that amount, such agreement was a payment of the note. The court decided so to charge, and the defendants' counsel excepted.

Now, if such agreement had been proved, it would have operated as an extinguishment of the plaintiff's claim. The agreement would not have been technically payment, but it would have discharged the debt by way of accord and satisfaction. (*Davis v. Spencer, 24 N. Y., 386, on page 391. Pratt v. Foote, 9 id., 463.* In *Pratt v. Foote*, the facts proved made it a case of technical payment; and Judge SELDEN notices the difference between that case, and one like the present, where there was a mere substitution of one executory agreement or obligation for another. So he says a transaction of this kind "operates only by way of accord and satisfaction, and must be pleaded as such." Judge ALLEN, also, in *Davis v. Spencer*, says: "The mutual promises are regarded as the execution of the accord, the satisfaction of the original contract, contemplated by the parties." Thus it seems the proposition presented in the request was not technically sound in law; although, doubtless, it was intended by the defendants' counsel to embrace

Van Etten v. Troudden.

the idea of a good defence, to wit, an extinguishment and satisfaction of the claim in suit. If it could be seen that this defence, in this form, had been kept from the jury, under this ruling, I should be inclined to hold it error. But such was plainly not the case. The defence was presented, and the jury was required to find on the question whether there was an arrangement with the plaintiff, by which he was to look to the firm of Charlton & Co. for pay, whether that firm had not by agreement between the parties become the principal debtor. These questions were submitted to the jury, as, I think, fully and fairly. Indeed, during the entire trial, and by the charge of the judge, these questions were kept prominently before them. They were repeatedly informed by the court, in substance, that if they found from the evidence that there was an agreement with the plaintiff, by which the firm of Charlton & Co. became the principal debtor, that is, by which the plaintiff (in the language of the request) agreed "to accept the firm of Charlton & Co. for the payment of the note in suit," they should find a verdict for the defendants. After careful consideration of the case, I am of the opinion that the record discloses no error demanding a new trial.

The order denying a new trial on the minutes should be affirmed, and the plaintiff is entitled to judgment on the verdict, with costs.(a)

Ordered accordingly.

[THIRD DEPARTMENT, GENERAL TERM at Elmira, May, 1874. *Miller, Boakes and Boardman*, Justices.]

(a) *S. C.*, reported briefly, 1 *Hun*, 432.

In the MATTER OF OPENING HOUSE AVENUE, in the
City of Troy.

When a statute confers authority to take the lands of individuals for public use, and for the assessment of damages upon the property of contiguous owners, the statute must be strictly pursued, step by step; or the proceedings will be without the sanction of law, and void.

Under the authority of a city charter, providing that where lands were to be taken for a street, &c., in case of inability to agree with the owners, as to compensation, commissioners of estimate should be appointed, proceedings were taken to lay out and open an avenue, to extend from River street to the lands of the T. and B. R. R. Co. A resolution thus to open the proposed avenue was adopted by the common council, and a committee appointed to locate and define its boundaries, and to negotiate for the lands required. Such committee, having made the location, by metes and bounds, reported in favor of the opening of the avenue from River street to the lands of the T. and B. R. R. Co.; that the lands east of Vail avenue could be obtained, for a reasonable price; but that, as to the land west of that avenue, the negotiations with the owners were unavailing; and they recommended the appointment of commissioners of estimate, and reported a resolution to carry the recommendation into effect. The common council accepted the report, and adopted the resolution; but subsequently reconsidered its action; and the acceptance of the report was rescinded, so far as it recommended the opening of the avenue from River street to Vail avenue; and it was resolved that the northern terminus of the proposed avenue should be the easterly line of Vail avenue.

Held, that in so far as the report was accepted, the appointment of commissioners of estimate became unnecessary, and was unauthorized; inasmuch as it appeared by the report, as accepted, that the lands proposed to be taken could be obtained for a reasonable price, by negotiation. That it was only in case inability to agree with the land owners that authority was given to appoint such commissioners.

Held, also, that instead of applying for, and obtaining, an order appointing commissioners of estimate, a committee should have been appointed, to obtain terms from the owners who had signified their willingness to accept a reasonable price for their lands.

Held, further, that there was no authority for granting an order appointing commissioners of estimate; nor for a subsequent order confirming their report; nor for an order confirming the report of the local assessors.

That these informalities in the proceedings were jurisdictional, and therefore could not be waived. That the common council were bound to follow the course prescribed by law; otherwise jurisdiction to proceed was lost.

A PPEAL from an order made at a Special Term refusing to vacate an order appointing commissioners

Matter of opening House Avenue.

of estimate; from order confirming their report; and from order confirming report of the local assessors of the city of Troy. (*S. C., reported briefly, 3 Thomp. & C., 770.*

H. A. Merritt, for the appellant.

R. A. Parmenter, for the city of Troy.

By the Court, BOCKES, J. By these proceedings lands were to be taken for public use; and damages were to be assessed upon the property of contiguous owners—hence the statute conferring such authority must be strictly pursued, step by step, or they are without the sanction of law and void.

Preliminary steps were taken to lay out and open House avenue; which was to extend from River street to the lands of the Troy and Boston R. R. Co.; and a resolution of the common council was adopted thus to open it; and a committee was appointed to locate and define its precise boundaries, and to negotiate for the lands required therefor. This committee proceeded to make the location by metes and bounds, and also negotiated for the lands proposed to be taken; as authorized and required to do, and reported their action to the common council. The proposed avenue, as reported, was to extend from River street to the lands of the railroad company, pursuant to the original application; and it was further reported by the committee that the lands east of Vail avenue could be obtained for a reasonable price; but that negotiations with the owners of the lands west of Vail avenue were unavailing. The committee recommended the appointment of commissioners of estimate, and reported a resolution to carry the recommendation into effect. The common council accepted the report, and adopted the resolution.

Matter of opening House Avenue.

To this point the proceedings were regular and valid. At least, no suggestion to the contrary is offered.

Following this, it seems that the common council reconsidered its action.

The former acceptance of the report of the committee was rescinded, so far as it recommended the opening of the proposed avenue from River street to Vail avenue; and it was resolved that the northerly terminus of the proposed street should be the easterly line of Vail avenue.

Now, in so far as the report was accepted, the appointment of commissioners of estimate became unnecessary. Indeed their appointment was then unauthorized; for according to the report as accepted, the lands proposed to be taken could be obtained by negotiation for a reasonable price. It was only in case of inability to agree with the owners of the lands to be taken, that authority was given to appoint commissioners of estimate.

It is unnecessary to determine whether or not the common council could shorten or change the route from that designated in the original application, and established by resolution; for, conceding that the proposed street was well laid between River street and Vail avenue, there was no need of, nor ground in law, for the appointment of commissioners of estimate, inasmuch as such need and authority in law existed only when the lands could not be obtained by negotiation. As to all the lands now to be taken, they could be procured by agreement with the owners for a fair and reasonable price. So the report, as accepted, explicitly stated.

Instead of applying for and obtaining an order appointing commissioners of estimate, a committee should have been appointed to obtain terms from the owners who had signified their willingness to accept a reasonable price for their lands. Plainly, there was no authority for granting the order of December 28th, 1872,

Matter of opening House Avenue.

appointing commissioners of estimate, nor for the subsequent order confirming their report; and it follows that the order confirming the report of the local assessors, May 17th, 1873, was also improper.

The Special Term should have denied the motion to confirm the report of the local assessors, and should have granted the motion of the appellant to vacate the orders of December 28th, 1872, and of February 5th, 1873. The proceedings on which these orders were based were without the authority and sanction of law.

Nor has the appellant waived his right to insist on the informalities above suggested. They were jurisdictional. The common council were bound to follow the course prescribed by law, or jurisdiction to proceed was lost.

This view of the case renders it unnecessary to consider the further point urged by the appellants' counsel, that the local assessors did not make the assessment to accord with the award of the commissioners of estimate. This objection is not examined.

The order appealed from should be reversed, and the motion to confirm the report of the local assessors denied; also the orders of December 28th, 1872, and of February 5th, 1873, should be vacated and set aside. Ten dollars costs of appeal allowed.

[THIRD DEPARTMENT, GENERAL TERM at Albany, January, 1874.
Miller, Boeckes and Boardman, Justices.]

BARTEAU, executor, &c., vs. THE PHENIX MUTUAL
LIFE INSURANCE COMPANY.

Inquiries put to an applicant for life insurance are deemed to relate to matters which affect the general health, and the continuance of life, and not to temporary and occasional physical disturbances, the result of accidental causes, to which all men are more or less subject. These are not supposed to be in the mind of the parties.

But when the party is interrogated in regard to a disease of well-marked symptoms, alarming in character, which are generally regarded as affecting the general health, and as threatening the continuance of life, from the danger of recurrence, he is bound to speak, and to state the exact truth.

In an application for life insurance, signed by the insured, it was declared that his answers to the questions annexed were fair and true; and that any untrue or fraudulent answers, or suppressions of fact, should render the policy null and void. Among the questions then put to him was this: "whether he ever had paralysis?" He answered, "No." The evidence was quite unequivocal, and conclusively showed that the insured had had two serious and alarming attacks of paralysis previous to the issuing of the policy; and that he, himself, stated, on repeated occasions, that he had paralysis; said that he had had two attacks, and was apprehensive that the third would be fatal. The third attack occurred about ten months after the issuing of the policy, and did terminate fatally. *Held*, that the question asked was one of undoubted importance, and the company was entitled to a truthful answer. And that, the statement in the application being manifestly untrue, the policy issued upon such application was void, and no recovery could be had, thereon.

A motion for a new trial on the ground of newly discovered evidence should be denied when the evidence, as set forth in the moving papers, is wholly cumulative, and for aught that appears, it might, with due diligence, have been discovered, and been produced on the trial, had proper efforts been made.

THIS is an appeal from an order denying a new trial on the minutes of the court; also an appeal from the judgment in favor of the plaintiff on the verdict of the jury; and there is also an appeal from an order of the Special Term denying a motion for a new trial on the ground of newly discovered evidence. The action was brought upon a policy of insurance, issued by the defendants, upon the life of Joseph E. Althouse, the plaintiff's testator. The policy was for \$2,000, and bore date July 29th, 1867. Althouse died June 14th,

Bartean v. Phoenix Mutual Life Insurance Co.

1868. The defence was an alleged breach of warranty, and fraud in the statement made by the testator, in the application for insurance, that he never had paralysis, of which disease he ultimately died. The facts proved on the trial and proper to be considered on the appeals, are stated, or referred to, in the following opinion. (*S. C.*, briefly reported, 1 *Hun*, 430.)

John Cadman and R. E. Andrews, for the plaintiff.

H. W. McClellan, for the defendants.

By the Court, BOCKES, J. In the application for assurance, signed by Althouse, and which formed the basis of action by the company in issuing the policy, it was declared that his answers to the questions thereby propounded to him were fair and true; and that any untrue or fraudulent answers or suppressions of fact should render the policy null and void. Among the questions then put to him was this; whether he ever had paralysis? He answered, "No." This question was one of undoubted importance. It called for information as to a disease subtle in character, and the more alarming and hazardous from the probability and danger of its recurrence. The company were entitled to a truthful answer. Was it true then, as the applicant stated and represented, that he never had paralysis? This statement should be interpreted with fairness to the assured. If in fact he never had more than a temporary illness or ailment, merely indicating the disease in some of its symptoms, but of no pronounced type, his answer should be received and construed with reference to that state of facts. So it is a fair rule of interpretation, that the inquiries put to the applicant for life assurance, are deemed to relate "to matters which affect the general health, and the continuance of life;" and not to "temporary and occa-

Bartean v. Phoenix Mutual Life Insurance Co.

sional physical disturbances, the result of accidental causes, to which all men are more or less subject." These are not supposed to be in the mind of the parties. On the other hand, when the party is interrogated in regard to a disease of well-marked symptoms, alarming in character, which all well informed persons regard as affecting the general health and as threatening the continuance of life, from the danger of its recurrence, he is bound to speak, and to state the exact truth. Tested by these, as it seems to me, just principles and requirements, how stands the case now before us for examination? Was the statement of the plaintiff's testator, considered with reference to his prior condition of health, and the obvious import of his words, truthful? Had he never had paralysis — distinctly, unmistakably, confessedly — the knowledge of which caused to him serious alarm and apprehension? The proof is quite unequivocal and conclusive, as it appears to me, on this subject. There were two attacks prior to the last, which terminated fatally; the first in August, 1865, the second in March, 1866, the last in June, 1868, about ten months and a half after the issuing of the policy. That he had paralysis in 1865 and in 1866, is proved by many witnesses. His physician, who attended him on those occasions, so testified, and gave the diagnosis of his case. He stated that one-half of his body was affected; that the muscles of his face, arm and leg were involved; that his power of locomotion was impaired; that his features were distorted; that he could not articulate. The doctor was corroborated, in the main, by several other witnesses, his neighbors, who saw him and conversed with him frequently. One of these witnesses testified that on one occasion when he saw him, he attempted to speak and could not, except with difficulty; that he had not the use of his tongue and mouth; that he drooled; that there was a difficulty in his walk. Another testified that his locomotion was

Bartean v. Phoenix Mutual Life Insurance Co.

impaired, as was also his articulation. Other witnesses, several of them, testified to similar symptoms and indications of the disease. That he was afflicted with this disease was a matter of notoriety in the neighborhood. Besides, on repeated occasions, he stated that he had paralysis; said he had had two attacks, and expressed apprehension that the third would be fatal, as it was in fact. He stated to the physician who attended him in his last illness, that he had previously an affection of the same kind.

It appeared, also, that a few months before he procured the policy in suit, and when he had the subject of obtaining an insurance on his life under consideration, he was told, in substance, that he could not get a policy on an application giving information of his having had paralysis.

Now all this evidence stands without any substantial contradiction or explanation. Some proof was given on the part of the plaintiff, which tended to weaken it, perhaps, to some inconsiderable extent. But, in the main, its force is unshaken; and the necessary conclusion is that the assured had two serious and alarming attacks of paralysis, prior to the presentation of his application for this policy. Yet to the interrogatory, had he ever paralysis, he replied "No." He was fully aware that the disease had been upon him, and was conscious of the great danger to be apprehended from it. He well knew that it was more than a mere "temporary illness"—more than a mere "physical disturbance" or "slight difficulty," of which, in all human probability, he had wholly recovered, and in regard to which, or to its recurrence, he need entertain no fears. Both attacks were, in point of fact, of a seriously alarming character, and were evidently so considered by his physician, by his neighbors and by himself. His statement in the application was manifestly untrue. The inquiry called for an answer of undoubted materiality and importance, and

Bartean v. Phoenix Mutual Life Insurance Company.

the party should be held to the consequences of a false answer. Therefore, by express stipulation, the policy, issued upon the application which contained this false statement, was void. (*Fitch v. Amer. Pop. Life Ins. Co.*, 2 *N. Y. Sup. Ct. Rep.*, 247.)

In considering this case, due regard has been had (in so far as they here have application) to the rules laid down for our guidance in giving construction and effect to the statements of assured persons in their applications for policies, and to the observations of the learned judges in the cases to which our attention has been called, and particularly to the examination of the subject in *Higbie v. Guard. Mut. Life Ins. Co.*, (53 *N. Y.*, 603; *S. C.*, 86 *Barb.*, 462;) also in *Peacock v. N. Y. Life Ins. Co.*, (20 *N. Y.*, 293;) *Horn v. Amicable Life Ins. Co.*, (64 *Barb.*, 81;) *Hogle v. Guard. Life Ins. Co.*, (6 *Rob.*, 587;) *Campbell v. N. Eng. Mut. Life Ins. Co.*, (98 *Mass.*, 381;) *Bliss on Life Ins.*, §§ 105, 107, 117.

If the conclusion above arrived at be sound, the learned judge should have directed a verdict for the defendant, as requested; or, if the case was allowed to go to the jury, their verdict in favor of the plaintiff should have been set aside on the minutes of the court.

The order denying a new trial, and the judgment on the verdict should be reversed, and a new trial should be granted, with costs to abide the event.

This disposition of the case renders the appeal from the order denying a new trial on the ground of newly discovered evidence of little importance. I am of the opinion, however, that the motion based on that ground was properly denied. The newly discovered evidence, set forth in the moving papers, was wholly cumulative; besides, for aught that appears, it might have been discovered, with due diligence, and been produced on the trial, had proper efforts been made. As is well said by counsel, the same diligence would have discovered the evidence before as well as after the trial.

Darbee v. Elwood.

The order denying a new trial on the ground of newly discovered evidence should be affirmed, with \$10 costs.

Judgment accordingly.(a.)

[THIRD DEPARTMENT, GENERAL TERM at Elmira, May, 1874. *Miller, Bockes and Bordman*, Justices.]

(a) Affirmed, by Court of Appeals, Nov. 1876. (See 10 *Hun*, v.)

DARBEE vs. ELWOOD and others.

Where, upon a motion for a new trial on the ground of newly discovered evidence, it is made to appear that a paper found since the trial and produced on such motion, clearly and absolutely settles the question controverted on the trial, on oral proof, contrary to the verdict, then a new trial should be granted; for a false verdict should not be allowed to stand.

So, too, if it should appear fairly probable that with the newly discovered evidence, having the strength and verity which usually attaches to a written instrument, a different verdict would be rendered, then, also, should a new trial be allowed.

The rule is, that the newly discovered evidence must be so decisive in character as that it would, to a reasonable certainty, be productive, on another trial, of an opposite result.

Where the paper, claimed to constitute the newly discovered evidence, was enveloped in suspicion to an extent which materially shook its integrity; was shown to be in a mutilated condition, and a portion of it detached; and it was doubtful whether a jury would hold it at all reliable as the precise and entire paper set up as a defence on the trial; and, were it produced, the cause would still be one resting on conflicting evidence and doubtful facts, substantially as when before submitted; *held*, that the case was not brought within the above rule.

THIS was an appeal by the defendants from an order denying a motion for a new trial on the ground of newly discovered evidence.

Wm. Youmans, Jun., for the appellants.

Wm. Gleason, for the respondent.

Darbee v. Elwood.

PER CURIAM. It became a very important, if not a controlling, question on the trial of this action, whether the assessment roll, made for the town of Colchester, in the year 1849, contained an assessment of the lands in controversy, and was also duly verified by the assessors of that town. The original roll could not be found, and secondary evidence was given *pro and con.*, on these questions. The case was sent to the jury on the evidence, under the charge of the judge, to the effect that if they should find that the original assessment roll had the certificate of the assessors upon it, then it was perfect, and the tax-deed, relied on by the defendants, was valid; and the judge added: "If you shall find that the assessment roll was defective, then the plaintiff will fail in this action, and your verdict should be for the defendants." The jury found for the plaintiff. Some of the evidence on the trial bore upon the sufficiency or regularity of the *tax roll* also — the roll delivered to the collector with the warrant signed by the supervisors attached; and this roll was not produced, and seems also to have been, at the time, lost or mislaid. After the trial the defendants' counsel found, or learned, where this *tax roll* was; and, on inspecting it, discovered that it did not contain any certificate or verification by the assessors; nor did it contain an assessment of the land in dispute. A motion was thereupon made for a new trial, on the ground that this paper, showing these defects conclusively, could now be produced; and also upon the further ground that this paper was in the possession of the plaintiff's counsel at the time of the trial, and was fraudulently suppressed by him.

The last ground stated, it seems, was fully met and overcome by the answering affidavits. The counsel repel the charge of an intention to suppress this paper, and show that it was the other roll — the assessment roll — as to which inquiry was material; and that there was not, in fact, any withholding of either, on their part.

Without here collating the affidavits, or making extracts from them, it is deemed sufficient to say that the charge of a fraudulent suppression of evidence is not satisfactorily established.

Were it, however, made now to appear, that the *tax roll*, found since the trial and now produced, clearly and absolutely settled the question controverted on the trial, on oral proof, contrary to the verdict, then a new trial should be granted ; for a false verdict should not be allowed to stand.

So, too, if it should appear fairly probable that with the newly discovered evidence, having the strength and verity which usually attaches to a written instrument, a different verdict would be rendered, then also should a new trial be allowed. (2 *Wash. Cir.*, 411. 2 *W. Bl.*, 955.) The rule is, that if it appear that the newly discovered evidence be so far satisfactory and conclusive in its character, that it would probably produce a different verdict from that rendered, a new trial should be granted.

Tested by this rule, how stands the case under examination? In the first place, the production of the *tax roll* would not show the assessment roll made by the assessors defective in the particular urged on the trial. Notwithstanding the tax roll had not the assessors' certificate of verification attached, the assessment roll might well have been perfect in this regard ; and the case would still have been open to oral proof on that point ; in which case, for aught that appears, the proof and the verdict would have been the same as on the former trial. Indeed, it was then an established or conceded fact, that the tax roll had not the verification of the assessors attached to it ; and the judge charged, in terms, that it appeared "that the tax roll did not have the certificate of the assessors." Therefore the case, under the charge of the judge, was all that the production of the tax roll would have made it, as regards the

Darbee v. Elwood.

absence therefrom of the assessors' certificate; and its production, consequently, would not have strengthened the defendant's position on the trial, in that particular. Clearly its production would not have made it to appear, with certainty, nor with any greater degree of probability than was then apparent, that the assessment roll was without verification by the assessors.

But there is great difficulty in holding, on the proofs before us on this motion, that the tax roll now produced, is of controlling significance in any particular material to this case. The paper is enveloped in suspicion to an extent which materially shakes its integrity. It is doubtful whether a jury would hold it at all reliable as the precise and *entire paper* issued to the collector, under which he was empowered to make collection of the taxes. It is shown to be in a mutilated condition. According to the affidavits read on the motion, much that originally belonged to it has been detached. The papers before us tend strongly to show that it originally embraced assessments of lands of non-residents, not now appearing thereon.

If it be true that this tax roll now produced is imperfect — has been mutilated — that a portion of it, as originally issued to the collector, has been detached — it would afford but the slightest evidence, if, indeed, it would afford any whatever, tending to impeach the correctness and completeness of the assessment roll made and filed by the assessors. It cannot be well disputed, that on the papers before the court, the integrity of this tax roll is greatly impaired, not to say effectually impeached. Its production under the assailing evidence here brought against it, would not establish its own original entireness — what it originally contained; much less prove anything against the completeness and legal effect of the assessment roll filed by the assessors.

Thus the case is not brought within the rule requiring the granting of a new trial, where the newly discovered

Darbee v. Elwood.

evidence would establish a case contrary to the finding of the jury, or would probably induce and support a verdict different from that already rendered. It is laid down in the books, that the evidence should be so decisive in character, as that to a reasonable certainty it would be productive, on another trial, of an opposite result. (*Hilliard on New Trials*, (2d ed.,) 491. *Powell v. Jones*, 42 *Barb.*, 24. *U. S. v. Cornell*, 2 *Mason*, 91. *Bronson v. Hickman*, 10 *Ind.*, 3. *Simpson v. Wilson*, 6 *id.*, 474. *Hull v. Kirkpatrick*, 4 *id.*, 638. *Burr v. Palmer*, 23 *Verm.*, 244. *Snowman v. Wardwell*, 32 *Maine*, 275.) The production of this paper, with the suspicion that rests upon its integrity, would not remove the difficulties of the defendant's case, or make it clearer or more satisfactory than when presented to the jury on the former trial. The case would still be one resting on conflicting evidence and doubtful facts, substantially as when before submitted. The same uncertainty would remain as before existed.

We are of the opinion that the motion was properly denied by the court at Special Term, and that the order appealed from should be affirmed, with \$10 costs.(a)

Order affirmed.

[THIRD DEPARTMENT, GENERAL TERM at Schenectady, November, 1874.
Miller, Boakes and Boardman, Justices.]

(a) *S. C.*, reported briefly, 2 *Hun*, 599.

FLETCHER and others, appellants, *vs.* UPDIKE,
respondent.

Where moneys were received by a husband from his wife, or collected upon notes owned by her at the time of her marriage, or realized from sales of her real estate, during coverture; *held*, that in the absence of any agreement by the husband to refund them to his wife, the same became his absolute property, on being reduced to possession, in virtue of his marital rights.

Held, also, that a promise, by the husband, to refund such moneys to the wife, made subsequent to the reception thereof, would not create a legal obligation against him; such a promise being without legal consideration, and void.

Held, further, that even though the husband received the proceeds of sales of land belonging to his wife, under an agreement with her that he would refund such proceeds to her; yet that, in such a case, there would exist a claim or debt *then due*, in favor of the wife, against her husband, for the amount so received by him; and that twenty-two years having elapsed before the claim was presented to the surrogate for allowance, it was barred by the statute of limitations; unless saved from the effect of the statute by a new and valid promise to pay, or such a recognition of the debt as would have the effect of a new promise.

An acknowledgment or promise, not made to the creditor, nor to any one acting in his behalf, is not sufficient to revive a debt barred by the statute of limitations.

To make a promise to pay available to renew or continue the debt, it should be made distinctly to appear that it was made at a time when its effect would be, plainly, to avoid the statute.

Since the Code, parol promises and admissions are insufficient to avoid the statute.

THIS is an appeal, by Adelia P. Fletcher and others, from a decree of the surrogate of Schuyler county, allowing to the respondent, Eleanor D. Updike, against the estate of her deceased husband, the sum of \$2,491.23, the amount of her claim presented to that officer for allowance. The items constituting the claim, as they appear in the sworn bill, were four in number, all for cash alleged to have belonged to the respondent, and charged to have been received by the husband, as follows: \$552 February 12, 1847; \$240 February 13, 1847; \$8 —, 1847, and \$65 —, 1856. Interest was computed on these items to September 3, 1874, the date of

Fletcher v. Updike.

the decree ; making the aggregate sum \$2,491.23 allowed against the estate.

Hurd & Fletcher, for the appellants.

M. J. Sunderlin and S. L. Rood, for the respondent.

By the Court, BUCKES, P. J. It appears from the proof introduced before the surrogate, that the respondent and the deceased intermarried in 1846 ; hence all these sums were received by the husband during coverture. It is also made to appear that the moneys were not received in gross sums, as charged in the bill, and above given, with dates ; but came to the hands of the husband at various times, and in comparatively small sums. All, however, was received between February 12th, 1847, and, perhaps, about June, 1852, except the avails of the Pierson note, which was paid in 1856. Now, in the absence of any agreement on the part of the husband to refund those moneys to his wife, the same became his absolute property on being reduced to possession, in virtue of his marital rights. Nor would a promise by the husband to refund the money to the wife, made subsequent to its reception, create a legal obligation against him. Such promise would be without consideration, and void. But it is insisted that the wife's funds were here permitted to go into the hands of the husband, under a promise on his part, that they should be restored and repaid to her. There is some evidence in support of this position, although such fact is not satisfactorily and conclusively proved ; certainly not as to all the money claimed by the respondent. However, let it be conceded, on this appeal, (1,) that the deceased, prior to June, 1852, received the avails of three pieces of real property belonging to his wife, the respondent, amounting to \$800,

Fletcher v. Updike.

with the accrued interest thereon ; and, (2,) that such avails, with the accrued interest, were received by him under an agreement with his wife that he would refund those moneys to her ; thus, in the most favorable aspect of the case for the respondent, there existed a claim or debt *then due*, against her husband, in her favor, for the amount of her funds thus received by him, principal and interest. Now, inasmuch as about twenty-two years elapsed before the claim was presented to the surrogate for allowance, it was barred by the statute of limitations, unless saved from the effect of the statute by a new and valid promise to pay, or such a recognition of the debt or obligation as shall have the effect of a new promise. It is claimed that such promise was repeatedly made by the deceased husband ; and this brings us to consider the case on the proof bearing on this point.

It is proposed to refer to the evidence given by the witnesses, in the order in which they were examined before the surrogate.

Mrs. Hirst, the first witness, spoke to the arrangement or agreement under which it is claimed the money was received by the husband. Her statement related to a period prior to 1852, and she says : "This was the only promise I ever heard him make." No *new promise* was proved by this witness.

Mr. H. Pierson speaks of two conversations he had with the deceased ; one in March, 1872, the other the year following ; in which the latter admitted, in substance, that he owed his wife and intended to pay her. These conversations, it must be remembered, were with the witness, not with the wife. This witness also states : "I have heard him say to her, (his wife,) he would pay her all he owed her, but would pay no compound interest." It does not appear when this promise was made ; hence its value as a new promise to take the case out of the statute is of little value. There are some

Fletcher v. Updike.

facts indicating that this may have been said about 1871 or 1872, but there is nothing definite and satisfactory in that regard.

To Mr. Harrison the deceased admitted, in substance, in September or October, 1873, that he owed his wife for money he had of her. Mr. A. H. Pierson speaks to conversing with the deceased in the years 1859, 1860 and 1861, but he does not say the deceased made any promise to the wife to pay. She wanted a mortgage, but he declined to give one. The witness adds, that in a conversation with the deceased, had about the first of the preceding August, he said: "I will pay my wife every cent I owe her." This was said to the witness personally.

Several other witnesses were examined, but nothing was proved by any of them bearing on the subject of a new promise.

Now, it will be seen, that the most of the evidence above stated or alluded to is of no value on the point under examination. The admissions and promises sworn to by the witnesses, except that spoken of by Mr. H. Pierson, were made to mere strangers. An acknowledgment or promise, not made to the creditor, nor to any one acting in his behalf, is not sufficient to revive a debt barred by the statute. (*Bloodgood v. Brown*, 8 N. Y., 362. *Wakeman v. Sherman*, 9 *id.*, 85. *Henry v. Root*, 33 *id.*, 534-5.)

The case, therefore, rests on the evidence of Mr. H. Pierson as regards a new promise; and on the sole statement testified to by him, that he had heard the deceased say to his wife, "he would pay her all he owed her." As before suggested, it does not appear when this was said, although it may perhaps be presumed to have been spoken in 1871 or 1872. But to make it available to renew or continue the debt or obligation, it should have been made distinctly to appear, that the promise was

Fletcher v. Updike.

made at a time when its effect would be plainly to avoid the statute.

However, the promise was by parol; as were all the statements and admissions relied on by the respondent to sustain the claim. The Code (§ 110) provides that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute, unless contained in some writing signed by the party to be charged thereby. The promises and admissions proved in this case were by parol only. They were, therefore, insufficient to avoid the statute. (*Shapley v. Abbott*, 42 N. Y., 443.) It is suggested that the claim or obligation in this case accrued before the Code took effect; hence that it may be waived and continued by a parol promise. (Code, § 73. *Van Alen v. Feltz*, 1 Keyes, 332. *Lansing v. Blair*, 43 N. Y., 48.) But the claim here sought to be enforced accrued principally, if not entirely, since July 1st, 1848, the time when the Code went into operation.

The land contracts, it is true, were made in 1847; but the alleged liability of the deceased did not rest on the contracts, but accrued against him, as was claimed, for moneys received by him thereon. There can be no pretence of claim against him, under the proofs, until the money came to his hands. Precisely how much he had received prior to July 1st, 1848, is not clearly shown. He had received \$35 on the Hirst contract, and \$8 from Mr. Pierson prior to that date; and probably one or two payments, of a little over \$100 each, on the sale to Hidden.

But all the balance of the \$800, (the amount of the land contracts,) with the accrued interest, came to his hands after the Code went into effect. To that extent, certainly, the claim was barred by the statute of limitations, as the case is presented on this appeal.

The respondent was under no disability which can obviate the objection urged. *Adams v. Curtis*, 4 *Lans.*, 164. *Minier v. Minier*, *Id.*, 421. *Wright v. Wright*, 54 *N. Y.*, 437. *Dunham v. Sage*, 52 *id.*, 229.)

It may be questioned here whether the agreement or promise testified to by Mrs. Hirst, which is here the basis of the claim, should have application to any moneys received by the deceased prior to July 1, 1848. Mrs. Hirst speaks of one occasion only; and says this was the only one when any promise was made by the deceased of which she had any knowledge; and in substance makes that occasion when, or immediately after, Mr. Hidden made a payment. Mr. H. made three payments; one, and perhaps two, of which were made, as may be inferred, after July 1, 1848. Whether the conversation spoken of by Mrs. Hurst occurred on the occasion of the first, second or third payment does not appear. She says: "This promise was made *after one* of the payments was made." As before stated, a promise to pay after the money became his own absolute property would raise no legal obligation against him; and if made to apply to moneys received by him after July 1, 1848, then the claim accrued subsequent to the time when the Code took effect; hence could not be revived or continued by a past promise. But it is unnecessary to discuss this case with a view to determine just when the conversation occurred to which Mrs. Hirst testified; nor just how much came to the hands of the deceased subsequent to July 1, 1848. On a retrial, perhaps, the case may be made clear on these points. It is sufficient on this appeal that the claim allowed by the surrogate was to a very great extent, if not wholly, barred by the statute of limitations. A reversal of the decree must be ordered.

The case has been above considered with reference to the respondent's claim for moneys paid to her deceased

Fletcher v. Updike.

husband upon the land contracts, which moneys were received by him during and prior to the year 1852. The surrogate also allowed for money received by the deceased on the Pierson note, paid in 1856. It is difficult to find any ground to support such allowance. The note belonged to the respondent at the time of her marriage, after which it came to the possession of her husband who, in 1856, received payment of it and delivered it up to the maker. There is no evidence that he held the note, or received the money other than as his own property.

In the absence of any agreement with his wife to restore or refund the money, or its equivalent, to her, there was no obligation resting on the husband to do so. The note and its avails belonged to the husband in virtue of his marital rights, unless his claim thereto was expressly waived; and there is no evidence in the case of such waiver. The promise testified to by Mrs. Hirst was made many years prior to the payment of the note to the husband. Besides, that promise had reference to the avails of the three land sales, if, indeed, it can be construed to have application to any other than to payments, or to a payment, made by Mr. Hidden. And if the money became the property of the husband when paid him on the note, a promise thereafter made to restore it to his wife would be void for want of consideration—hence would create no legal obligation against him. As the case stands before us on the evidence, the money received by the deceased in payment of the note was his own. Its reception by him did not make him debtor to his wife; and in this view a promise by him that he would pay her all he owed her, neither continued nor created a liability.

The decree appealed from must be reversed, and the proceedings must be remanded to the surrogate's court, for rehearing and retrial. The costs of this appeal should abide its final disposition in that court.

 Rusk v. Soutter.

Decree appealed from reversed, and proceedings remitted, with costs of appeal to abide the result. (a)

[THIRD DEPARTMENT, GENERAL TERM at Albany, January, 1875.
Bocks, Landon and Countryman, Justices.]

(a) *S. C.*, briefly reported, 3 *Hun*, 350.

WILLIAM K. RUSK, bank comptroller of the state of Wisconsin, *vs.* **WILLIAM K. SOUTTER** and others, executors, &c.

A bond was given to the bank comptroller of the state of Wisconsin, by M. and the defendant's testator, for the security of the circulating notes of a bank. M., the owner of the bank, sold and transferred its entire stock to D., who, with a surety, executed and delivered to the same officer a new bond, for the same purpose. The old bond was given up, and the new one accepted in its place. At that time, an act of the legislature was in existence, authorizing this to be done; and the parties acted in good faith, and intended to comply with its provisions. *Held*, that the old bond was extinguished by what the law denominates an accord and satisfaction made by a third party; and that an action would not lie to enforce it.

The obligors in the substituted bond, being sued upon it, failed to resist a recovery on the ground that they had executed it without authority of law; and judgment by confession was entered against them. *Held*, that by such omission they had waived their right of objecting that the law under which such bond was executed was unauthorized by the constitution of the state. And that the obligation mentioned in it became as effectual, against the obligors, as though the bond had been given under a valid law.

That a complete legal liability was created, and that was sufficient to render the new bond a good accord and satisfaction.

Held, also, that the bond which it was designed the comptroller should have, as the consideration of the exchange, having been sustained by a judgment of a court in Wisconsin, the plaintiff could not now stand upon the averment that such bond was unauthorized because the law under which it was made was not warranted by the constitution, without its ratification by a vote of the people.

A PPEAL from an order made on the trial, at a circuit, refusing to dismiss the complaint, and directing a verdict for the plaintiff.

Rusk v. Soutter.

The action was brought by the plaintiff as bank comptroller of the state of Wisconsin, to enforce a bond executed to him by M. and the defendants' testator, to secure the payment of the circulating notes of a bank in that state.

Mr. Wakeman, for the appellants.

D. M. Porter, for the respondents.

DANIELS, J. It appears from the case that Marston, the former owner of the bank for the security of whose circulating notes the bond in suit was given to the comptroller, sold and transferred its entire stock to Daniel, who procured to be executed and delivered to the same officer a new bond for the same purpose. The preceding bond was delivered up, and the new one accepted in its place. At that time an act, apparently valid, was in existence authorizing that to be done; and the parties evidently intended to comply, and supposed they had fully complied, with its provisions. No informality in the proceeding has been relied upon to defeat the effect of the transaction. And no bad faith appears to have intervened through which it can properly be impeached. On the contrary, the transaction seems to have been fairly entered into, by which the stock of the bank was transferred, and the purchaser, with the assent of the comptroller of the state of Wisconsin, who was the officer having the supervision and control of the banking business of the state, substituted a new bond as security for the notes expected to be circulated in the course of its business. Upon these facts, the old bond was extinguished by what the law denominates an accord and satisfaction made by a third party. The rule upon this subject is that, "if the accord and satisfaction be made by a third party and is accepted as satisfaction, it would seem to be sufficient, if the actual

Rusk v. Soutter.

debtor consent to look upon it as such." (2 *Par. on Cont.*, 688. *Booth v. Smith*, 3 *Wend.*, 66, and cases cited. *Frisbie v. Larned*, 21 *id.*, 450. *Babcock v. Dill*, 43 *Barb.*, 577. *Good v. Cheesman*, 2 *Barn. & Ad.*, 329. *Tilton v. Alcott*, 16 *Barb.*, 598, 599, 600.

The statute, however, which in terms conferred upon the comptroller the power to make this change in the bonds, was afterwards held by the Supreme Court of Wisconsin to be unconstitutional, because of the failure to submit it to a vote of the people. And that circumstance is relied upon by the plaintiff as sustaining the position that there was no lawful authority allowing the old bond to be surrendered and the new one to be taken in its place. It would undoubtedly be attended with that result, if that were all that there was of the case. For then the parties who executed the new bond would not have become liable for the performance of its condition. But it was not; for judgment by confession was entered against them upon the bond. They failed to resist a recovery on the ground that they had executed it without the authority of the law. By that omission they waived their right, as they had the power to do, of objecting that the law under which their bond was executed, delivered and received, was unauthorized under the constitution of the state. And the obligation mentioned in it became as effectual against them as though it had been given under a law against which no objection whatever could be made. (*Phyfe v. Elmer*, 45 *N. Y.*, 102, and cases cited.) In that way as full effect was secured for the substituted obligation as the parties to it designed it should have. And that extinguished, as it was intended to, the bond surrendered for it. A complete legal liability was, under the circumstances, created, and that was sufficient, under the authorities, to render the new bond a good accord and satisfaction. The judgment concluded the parties executing it from objecting afterwards that they were not

Rusk v. Soutter.

bound upon it, and merged the entire claim which the plaintiff could assert. (*Olmstead v. Webster*, 8 N. Y., 413.)

Both could not be pursued ; and as that which it was designed the comptroller should have as the consideration of the exchange has been sustained by a judgment of the courts of Wisconsin, he cannot now stand upon the averment that it was unauthorized because the law under which it was made was not warranted by the constitution without its ratification by the people.

The verdict should therefore be set aside and a new trial ordered, with costs to abide the event.

LAWRENCE, J. In my opinion the court below erred in directing a verdict for the plaintiff, and in refusing to dismiss the complaint.

First. This action proceeds upon the assumption that Mr. Squires, the former bank comptroller of the state of Wisconsin, exceeded his powers, when on the 6th day of October, 1859, upon the sale of the Tradesmen's Bank by Marston to Daniel, he (Squires) cancelled, destroyed or surrendered up the bond previously executed by Marston and the defendant's testator, and accepted in lieu thereof the bond of Daniel and his sureties. (*Van Steenwyck v. Sackett*, 17 Wisc. Rep., 654. *Rusk v. Van Nostrand*, 21 *id.*, 16, 166.)

It must, I think, be assumed, from the allegations in the complaint and from the evidence in the case, that at the time of the surrender of said bond it was the course and practice of the bank comptroller of the state of Wisconsin to surrender and deliver up bonds of this character, and to cancel the same, upon receiving other bonds ; and there is nothing in the case which can be fairly said to impute either to Marston or to the defendant's testator any fraud in procuring the withdrawal or surrender of said bond.

But it is claimed that, as subsequently the courts of Wisconsin decided, that the act of 1855, under which

the bank comptroller had exercised the power of withdrawing or surrendering the bond in question, was unconstitutional and void, because it had not been submitted to the people for ratification, therefore the surrender of the bond of Marston and of the defendant's testator was inoperative and ineffectual. Conceding (for the argument, but not admitting,) that this court is bound to follow a construction given by the courts of Wisconsin, years after a transaction occurred, to a provision of the constitution of the state, in opposition to the construction which practically prevailed at the time such transaction took place, see *Gelpecke v. City of Dubuque*, (1 *Wallace*, 175;) *Havemeyer v. Iowa Co.*, (3 *Wallace*, 294,) I think that there is a fatal objection to the plaintiff's case.

It is admitted by the complaint that prior to the execution of the bond in question Marston had delivered to the bank comptroller a bond, executed by himself and one Frederick P. James, in the same penal sum (\$25,000) with the same purpose and condition as the bond in question; and it is averred that the said bank comptroller, in violation of his duty, upon receiving this bond, surrendered the said bond of Marston and James, and took and accepted this bond in lieu thereof.

Now if the bank comptroller had no authority under the act of 1855, or under the laws of Wisconsin, as averred in the complaint, to surrender the bond of Marston and James, he had no authority to take the bond of Marston and of the defendant's testator in lieu thereof. The taking of the latter bond was just as much a nullity as the surrender of the former bond.

It seems then to be clear, that the wrong and injury of which the plaintiff complains, and which this action is designed to repair, arose not from the acceptance of the bond of Daniel, in lieu of the bond of Marston and of the defendant's testator, but from the illegal surrender

by the bank comptroller of the bond of Marston and James.

If the action of the bank comptroller, based upon the assumption that the act of 1855 was valid, is void, because that act is unconstitutional, then the bond executed by the defendant's testator was executed in furtherance of an illegal transaction, and is null and void.

Should it be contended that it does not affirmatively appear that the bank comptroller acted under the act of 1855, in taking the bond in suit, the answer must be that the complaint alleges that he acted in violation of the laws of Wisconsin, and that the case was tried on the theory that to prove that he acted in such violation it was necessary to show that the act of 1855 was invalid; and the decisions of the courts of Wisconsin were proved upon the trial with that view, and for that purpose.

Again; the complaint avers and admits that the bank comptroller acted in violation of the laws of Wisconsin in receiving and accepting the bond in suit, in lieu of the bond previously executed by Marston and James, and it is quite unimportant which law of the state the bank comptroller violated in this respect, provided he violated any law. If the state of Wisconsin can be allowed to maintain that the act of the bank comptroller was illegal in taking this bond for any purpose, it surely cannot at the same time seek to enforce the bond which is tainted with illegality.

All then that the plaintiff can in fairness claim, is to be remitted to the position which was occupied before the bank comptroller assumed to exercise any power under the unconstitutional act of 1855, or in violation of any law of said state.

In other words, the plaintiff's rights under the original bond are the same as they were before the defendant's testator executed his bond, and the testator's bond must be deemed in law never to have existed.

Second. I am strongly inclined to the opinion that

 Smith v. Randall.

under the peculiar circumstances disclosed by the case, the plaintiff is estopped from questioning at this late day the validity of the acts of the bank comptroller in surrendering and cancelling the bond which it is now sought to enforce. (*Bigelow on Estoppel*, pp. 276, 277, and cases cited.)

If the views above expressed are sound, it is, however, unnecessary to rest this case upon such estoppel.

There should be a new trial, with costs to abide the event.

DAVIS, P. J., concurred.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM at New York, October 8, 1874.
Davis, Daniels and Lawrence, Justices.]

JAMES J. SMITH vs. SAMUEL B. RANDALL,
executor, &c.

Where, in an action against an executor, there has been a reference, and a report in favor of the plaintiff, and a certificate by the referee, showing the presentment of the demand to the executor, an offer to refer, refusal by executor to refer, and a rejection of the claim, before suit brought, the proper practice is for the plaintiff to apply to the court for an order allowing costs.

The referee has no power to pass upon that question.

MOTION for an order allowing costs against an executor, to be paid out of the estate.

There has been a reference, and a report in favor of the plaintiff, and a certificate by the referee, showing the presentment of the demand to the executor, an offer to refer, and that the executor refused to refer, and rejected the claim. And thereupon this suit was brought.

Smith v. Randall.

C. D. Prescott, for the motion.

S. S. Morgan, opposed.

HARDIN, J. The defendant opposes this motion, on the ground that no order was necessary to enable the plaintiff to recover costs.

This question has been discussed in several cases ; and it is now quite well settled that an application must be made to the court, and that the referee has no power to pass upon such question. (9 *Barb.*, 388. 12 *How. Pr.*, 301, 353. 14 *id.*, 481. 23 *id.*, 137. 4 *Ab.*, *N.S.*, 399.)

I am aware that some cases are to be found, construing section 317 of the Code in such a manner as to render a motion necessary only in cases where it is sought to charge the costs upon the executor &c. *personally* ; but more recent cases are to the effect that the correct practice is to move for an order, in cases situated like this one. And following these cases, it must be considered that the plaintiff has followed the correct practice ; and his motion must be granted. (*Howe v. Lloyd*, 2 *Lans.*, 335. *Fish v. Crane*, 9 *Ab.*, *N.S.*, 252.)

This motion is therefore granted ; but as the question has recently been open to discussion, no costs of motion are allowed.

Ordered accordingly.

[HERKIMER SPECIAL TERM, January, 1872. *Hardin*, J.]

RICHARD CHILLINGWORTH vs. JOHN FREEMAN.

The judgment roll in an action brought by a creditor, against the administrator of a deceased judgment debtor, to reach the interest of such judgment debtor in real estate, to which action the heir at law of the debtor and his wife, the grantee, was not a party, is not admissible in evidence against such heir at law, in a subsequent action, brought against him by a creditor of the intestate for the same purpose.

Real estate was purchased by E. C., and the conveyance taken in the name of his wife, the purchase-money being, in part, advanced by E. C. *Held*, that the statute of uses and trusts (8 R. S., 5th ed., 15, §§ 51, 52,) impressed a trust upon the land in favor of persons who were creditors of E. C., at the time the payment was made and the conveyance taken.

And that a creditor, whose debt was then due, could enforce the payment of the same out of the lands so purchased, and which had descended to the defendant as the heir at law of the grantee named in such conveyance; where it appeared that the debtor had no legal estate which could be reached by a judgment and execution, and that there were no personal assets belonging to the estate of E. C.; that his administrator had settled his accounts and been discharged by the surrogate; and that the defendant was the sole heir at law, and represented the whole estate in the premises.

THIS action is in the nature of a bill in equity, to reach the interest of Edward Chillingworth in the premises described in the complaint, the title to which he took in the name of his wife, and she having died leaving the defendant her heir at law. The findings will present the facts upon which the decision of the questions involved is based. The debt arose in 1853. The conveyance was in 1862, and the payments by Edward C. were in 1862. The wife died in 1869, intestate, and the defendant is her sole heir at law.

H. C. Leavenworth and W. C. Ruger, for the plaintiff.

D. Pratt, for the defendant.

HARDIN, J. The ruling was reserved at the hearing in respect to the admissibility of the judgment roll in the action of this plaintiff against the administrator of Edward S. Chillingworth. That ruling was, by con-

Chillingworth v. Freeman.

sent of counsel, reserved, and is to be made at the time of the consideration of the other questions in the case.

The question raised by the objections made by the defendant has recently been examined by the Court of Appeal in *Sharpe v. Freeman* (45 N. Y., 802;) and in accordance with the rule there laid down, the objections are sustained and the judgment is excluded. It is not binding upon the heir at law; he was not a party to it; he had no opportunity to contest the claims of the plaintiff in that suit; and hence he is not bound by the judgment.

It appears by the proofs taken in this case that the administrator has converted into cash all of the personal assets of the intestate, and made a final settlement before the surrogate having jurisdiction in respect thereto; and that he was discharged before the commencement of this action. The proof also establishes that the intestate died *insolvent*, and that the assets which came to the hands of the administrator were only equal to about eighteen cents on the dollar of the debts and liabilities of the estate.

Thereupon the plaintiff comes into this court and invokes its powers to enable him, as a creditor of the intestate, to reach the money paid by the intestate upon his purchase of the house and lot described in the complaint.

It is now well settled that the intestate, the debtor, had no *legal estate* which could be reached by a *judgment* and *execution* against him, and that the plaintiff must be aided by a court of equity if he shall in any way reach the interest of the intestate in the premises. (3 R. S., 5th ed., p. 15, §§ 51 and 52. *Brewster v. Power*, 10 Paige, 562. *Wood v. Robinson*, 22 N. Y., 564. *Garfield v. Hatmaker*, 15 N. Y., 475; 31 Barb., 391; 60 *id.*, 62.)

The purchase-money, in part, having been advanced by the intestate, the sections of the statute of uses and

trusts already cited, impress a trust upon the land in favor of the creditors of the intestate at the time the payment was made and the conveyance taken in the name of his wife. (*Wood v. Robinson, supra.*)

It follows, therefore, that the plaintiff, as holder of the note made in 1853 by the intestate and kept alive by him by virtue of such resulting trust, is entitled to enforce the same out of the land so purchased, and which has descended to the defendant as the heir at law of the grantee named in such conveyance; and a decree must be made in aid of the plaintiff's right in that respect.

Were this action brought to enforce the plaintiff's rights, and sought to be sustained in virtue of the Revised Statutes conferring jurisdiction upon courts of equity, it might well be doubted whether the same could be sustained; but it is brought to reach property fraudulently disposed of, to enforce a pure trust declared by statute to exist in favor of a creditor. (*Conro v. Port Henry Iron Co.*, 12 Barb., 58. 1 Paige, 305. 6 *id.*, 526. 3 *John. Ch. R.*, 481. 6 *N. Y.*, 252. *McCartney v. Bostwick*, 32 *N. Y.*, 53; 46 *id.*, 12.)

It is urged by the defendant's counsel that the court should look into all the circumstances surrounding this case, and apply the same rules as though there was a question as to a voluntary conveyance by the husband to the wife, and pass upon the question of fact, in the light of the principles which govern that class of cases.

The statute (§ 52,) already quoted, declares that such conveyance shall be presumed fraudulent as against the creditors "at the time" of the person paying the consideration, and it is made the duty of the court to look into the evidence and circumstances surrounding the conveyance, and determine whether that "fraudulent intent is disproved," and if not fully satisfied that it is disproved, to give the proper and legitimate effect to

Chillingworth v. Freeman.

the presumption of fraudulent intent named in the statute.

The creditor, upon establishing that his debtor has paid the consideration for the land, and taken the conveyance in the name of another, starts with a presumption that the act of the debtor was fraudulent; and, until that is overcome, he may stand upon that presumption and demand the relief secured to him by the statute. (32 *N. Y.*, 59.) But as to subsequent creditors the rule is otherwise. (*Larmore v. Campbell*, 60 *Barb.*, 62, 4 *Abb. N.S.*, 210.)

And it is held, in numerous cases, that a resulting trust must arise at the time of the execution of the conveyance; and that the subsequent application of the funds of a third party to the benefit of the estate of a grantee, does not raise a resulting trust, so as to affect or divest the legal estate of the grantee. (*Tiff. & Bul. on Trusts and Trustees*, 32. *Rogers v. Murray*, 3 *Paige*, 397. *White v. Carpenter*, 2 *id.*, 217.)

And this is in harmony with the section of the statute which declares a trust in favor of creditors, "at the time," of the person paying the consideration, "to the extent that may be necessary to satisfy their just demands," existing at the time the conveyance is so taken.

The evidence taken in this case fails to establish that the payments in 1864 and 1866 were made with intent to defraud the creditors of the intestate, and therefore there is no ground for relief in favor of the creditors holding debts contracted subsequent to the conveyance of the legal titles in 1862 to the wife. (24 *N. Y.*, 623. *Dygert v. Remerschnider*, 32 *N. Y.*, 632, 636. *Wilber v. Fradenburgh*, 52 *Barb.*, 474. *Newman v. Cordell*, 43 *id.*, 448.

Some question was made, upon the hearing, by the defendant, in respect to the plaintiff's right to maintain this action without judgment against the debtor, and

Chillingworth v. Freeman.

execution returned ; but, as that question has not been raised upon the argument, it is not deemed necessary to consider it at length. But it may be observed, that no objection is taken, by demurrer or by answer that it appears that there are no personal assets belonging to the estate of the deceased, and that the administrator has settled his accounts and been discharged by the surrogate, and the defendant is the sole heir-at-law, and represents the whole estate in the premises.

Were the questions in respect to *personal property*, the case of *Bate v. Graham* (1 *Kernan*, 237,) would be an authority for holding the bill could not be sustained ; but this being a bill to enforce the "pure trust" which has been impressed upon the lands, and the administrator has been discharged, it is supposed, that the rule laid down in *Hayner v. Holker*, (14 *How. U. S. R.*, 36,) and in 50 *Barb.*, 430, justify the application of the plenary jurisdiction of a court of equity to the case made by the proofs.

The reasoning of the court in 32 *N. Y.*, 59, is in harmony with the right of the plaintiff to sustain this bill ; but the force of that case is somewhat impaired by the learned opinion of Chief Justice Church in 46 *N. Y.*, 12. In the latter case, however, *the debtor had been discharged before the commencement of the suit by bill to enforce the trust, and before the filing of lis pendens.*

But in this case *the debt remained, and the creditor had exhausted the personal assets, and the land only remained impressed with the trust, and to enforce that trust* this action is brought, in which the heir-at-law has had ample opportunity to contest the validity of the creditor's debt, and to present any defence which he might have thereto, as fully as though an application had been made before a surrogate for leave to mortgage, lease, or sell, real estate for the payment of debts. (45 *N. Y.*, 806.)

Chillingworth v. Freeman.

Judge GARDINER, in the *Chautauqua Co. Bank v. White*, (2 Seld., 252,) says that "the common law powers of the court, in reference to fraudulent trusts and conveyances are not touched" by the provisions of the Revised Statutes relating to creditors' bills. That "fraud and trust were familiar heads of equity jurisdiction, independent of the statute. The creditor invoking the aid of the court must establish his title to its interposition by alleging a lien, or a *quasi* lien, upon the real or personal property which was the subject of the trust; and he would then be entitled to relief, *notwithstanding he had a remedy at law by levy and sale upon execution*. In all cases of fraudulent trusts, the court may, in its discretion, direct a sale by a master, and compel the debtor and trustee to unite in the conveyance to the purchaser.

Again, in the language of PORTER, J., (32 N. Y., 60,) "it simply presents a case for the exercise of the *original jurisdiction* of a court of equity in enforcing a trust declared by law." Chief Justice CHURCH adverts to the cases quoted, and comments upon them, but his decision is finally placed upon the ground that the *debt and lien were gone*. He says, at page 22 of 46 N. Y., "The plaintiffs sought to enforce and secure a lien against this property by virtue of their rights as creditors. The debt having *been discharged*, they were *not creditors*, and could not avail themselves of the resulting trust, which was secured to *creditors only*. That relation must exist at the time of the *conveyance*, and at the time when the action is commenced to *establish the lien*."

The judgment here will establish the debt, declare the lien thereof upon the property named in the conveyance in favor of the creditor having a debt "at the time," and direct a sale of the property by a referee, and payment of the debt and costs out of the pro-

Bissell v. New York Central Railroad Company.

ceeds of sale, and a delivery of the surplus to the defendant.

Decision accordingly.

[ONONDAGA SPECIAL TERM, April, 1872. *Hardin*, Justice.]

AMOS A. BISSELL vs. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

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In an action to recover statutory penalties, commenced by the service of a summons only, there must be an indorsement upon the summons, of a reference to the statute giving the penalties for which the action is brought; otherwise the court will acquire no jurisdiction.

But if, after the service of the summons, the defendant serves a notice of appearance, that is equivalent to a service of the summons upon him; and such appearance gives jurisdiction, and cures defects in previous process.

Upon an appearance by an attorney in behalf of a defendant, jurisdiction can be predicated; and a judgment based thereon cannot be said to be void.

If a party omits to apply to the court for leave to enter a judgment, in a case where an application is necessary, the omission is a mere irregularity, and does not render the judgment void.

An order of the court, setting aside a summons for want of the proper indorsement, does not operate as a vacation of the judgment; where there is no provision in the order to that effect.

A judgment cannot be set aside for irregularity, on motion, after a lapse of one year from the time of entry, or notice thereof.

The "notice," referred to in section 174 of the Code, means a *written* notice.

A verbal notice to the defendant, of the judgment, cannot be held to cut off the power of the court to interfere with the judgment, upon motion. Nor will a notice of retaxation of costs have that effect.

A party seeking to hold a judgment by reason of the lapse of time in moving to set it aside, which judgment is erroneous, or questionable on the merits, should be held to strict practice.

Where a party, in his notice of motion, asks for "such further relief as may be just," such relief may be given as the facts presented on the motion warrant.

A complaint contained allegations against the defendant for having, contrary to the "Act to prevent extortion by railroad companies," passed March 27, 1857, charged the plaintiff thirteen cents extra fare from L. to B. on 567 occasions, and asked for judgment for the excess, and \$50 penalty for each

Bissell v. New York Central Railroad Company.

violation of the statute. *Held*, that the plaintiff was entitled to recover one penalty of \$50, and the excessive fare paid, but was not entitled to recover 566 penalties, in addition.

MOTION on the part of the defendant to set aside a judgment for \$28,373.58 damages, and \$17.91 costs, entered in Oneida county clerk's office 2d September, 1871.

This action was brought to recover penalties given by the act of 1857 (chap. 185,) "to prevent extortion by railroad companies;" and was commenced by service of summons only, 17th May, 1875.

On the 20th May, 1871, C. S. Fairchild, Esq., an attorney of this court, served a notice of appearance and demand for a copy of the complaint. The complaint was served personally upon the defendant's attorney on the 28th day of June, 1871. The defendant gave notice of a motion, for the August Special Term, of 1871, at Herkimer, held by Justice MORGAN, to set aside the summons and complaint, on the ground that there was no indorsement upon the summons of a reference to the statute giving the penalties for which the action was brought.

The Special Term denied the motion. The defendant, on the 2d of September, 1871, appealed from the Special Term order to the General Term of the court. The appeal was heard, and on the 27th day of September, 1871, a decision was made in these words: "Order of Special Term reversed and summons set aside, with \$10 costs." That order was entered with the clerk of Oneida county, as appears by his certificate.

The plaintiff issued execution upon the judgment, and the same was received by the sheriff of Oneida September 7, 1871, and a levy made upon the property of the defendant, soon thereafter.

The defendant moves to set aside the judgment and execution, for the following irregularities, to wit:

1st. That by the service of the summons, without an indorsement thereon referring to the statute giving the

Bissell v. New York Central Railroad Company.

action, the court acquired no jurisdiction, and the judgment was void.

2d. That said judgment was irregularly entered, no application having been made to the court therefor. .

3d. That the order of the General Term of this court, setting aside the summons in this action, and the entry thereof in the county of Oneida, operated to vacate the judgment. And for such other or further relief as to the court shall seem just. The judgment had been entered more than a year when notice of this motion was given.

James M. Willett, for the motion.

C. W. White, opposed.

HARDIN, J. The plaintiff's learned counsel submits an elaborate argument, in which he undertakes to demonstrate that the summons required no indorsement of a reference to the statute giving the penalty, and that the Code has swept away the provisions of law in respect to such indorsement.

But those questions were examined by the General Term in this case, and in the case of *Sarah Cox v. New York Central and Hud. Riv. R. R. Co.*, decided in March, 1872.^(a) In this last case JOHNSON, J., in delivering the opinion of the court, says: "All the decisions and books upon practice agree that the object of the Revised Statutes, in requiring this reference in actions for penalties to be indorsed upon the process issued, was to inform the defendant of the nature and cause of action against him." (*Avery v. Slack*, 17 *Wend.*, 86. *Thayer v. Lewis*, 4 *Denio*, 269. *Sawyer v. Schoonmaker*, 8 *How. Pr.*, 198. *Perry v. Tynen*, 22 *Barb.*, 139. *Andrews v. Harrington*, 19 *id.*, 343.) The same opinion, in alluding to the appeal from the Special Term in this

(a) 61 *Barb.*, 615.

Bissell v. New York Central Railroad Company.

present case, contains these words: "The summons had been served, without any reference appearing anywhere, and it was shown by the papers that the defendant did not know what the cause of action was until the complaint was served, after appearance by the defendant." The judge adds: "That case was properly decided, as there was no compliance whatever with *the requirements of the statute* when the *action was commenced*." It being thus conclusively shown that the General Term held that the provisions of law requiring the indorsement of a summons by a reference to the statute giving the penalty, in this class of actions, must be complied with, it is the duty of this court to follow the law as laid down in the appellate court; and applying it to this case, the argument of the plaintiff's counsel upon this question need not be examined.

The learned counsel of the defendant insists that "the court acquired no jurisdiction of the defendant by the service of a summons without any reference being indorsed thereon to the statute giving the action."

After the service of the summons, the defendant served a notice of appearance, and that has been held, repeatedly, equivalent to the service of a summons.

Section 139 of the Code provides that "a voluntary appearance of a defendant is equivalent to the personal service of the summons upon him."

The cases hold that such an appearance gives jurisdiction, and cures defects in previous process. (*Wright v. Jeffrey*, 5 Cowen, 15.) In that case, the capias was returnable on Sunday, and the appearance was held to cure the defect. In *Vanderpoel v. Wright*, (1 Cowen, 209,) where the capias was served on Sunday, it was held that the appearance cured the service. In *Bixby v. Winchel*, (7 Cowen, 365,) it was held that by appearing on a void process, though without knowledge of its defect, the party had taken a step by which he was regularly in court; and the court refused to interfere where

Bissell v. New York Central Railroad Company.

it appeared the party acted in ignorance that the process was void. In *Webb v. Mott* (6 *How.*, 439,) it was held that a party, after a general appearance, cannot be heard to object to the jurisdiction of the court.

In *Dix v. Palmer* (5 *How.*, 233,) the court declares, "that a defendant having appeared in the action, generally, admits himself to be regularly in court, and therefore all defects in the summons, and its service, and even the total omission of any summons at all, becomes immaterial." (9 *How.*, 445. 11 *id.*, 138. 1 *Abb.*, 248. 2 *id.*, 411. 17 *id.*, 36. 3 *Rob.*, 366.) It will be observed that section 139 of the Code declares "that from the time of the service of the summons in a civil action * * the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings."

True, the summons is set aside by the order, but from the time of the service the court is to be "deemed to have acquired jurisdiction;" and especially in a case where there has been added to the service of summons a general notice of appearance by an attorney, in behalf of the defendant. (37 *N. Y.*, 502. 42 *id.*, 31.) The defendant urges that the judgment was irregularly entered because no application was made to the court.

If we assume that in this case an application should have been made to the court, for leave to enter judgment, the omission to do so was an irregularity. The judgment is not void for such omission. (*Bank of Genesee v. Spencer*, 18 *N. Y.*, 153. *Schaettler v. Gardiner*, 47 *id.*, 405.)

It is also insisted by the defendant's learned counsel, that the order of the General Term setting aside the summons for want of such indorsement, operated as a vacation of the judgment. There was no provision in the order of the General Term to that effect, and the most that was accomplished by the order was to strip from the record the summons.

Bissell v. New York Central Railroad Company.

The jurisdiction of the court over the parties, and the subject-matter, remained. As before shown, section 139 expressly declares that "from the time of the service of the summons, the court is to be deemed to have acquired jurisdiction." In this case there had been a general appearance, and that remained, and jurisdiction could be predicated upon it; and a judgment based upon it cannot be said to be void. The case of *Hullett v. Righters*, (13 *How.*, 43,) cited by defendant, was one where the jurisdiction of the court depended upon publication of summons, and it was clear, by inspection of the record, that the court had not acquired jurisdiction; and it was there very properly held that the judgment, being void, could be set aside after the lapse of a year.

The plaintiff insists that the judgment having remained for one year, cannot now be set aside.

So far as the grounds already considered are relied upon by the defendant, it may be assumed that they are confined to mere irregularities.

By section 2 of the Revised Statutes (*vol. 2, p. 371*.) it is provided that "no judgment in any court of record shall be set aside for irregularity, on motion, unless such motion be made within one year after the time such judgment was rendered." The irregularities complained of by the defendant are barred by that statute. (2 *Cowen*, 548. *Park v. Church*, 5 *How.*, 381.) Nor does section 174 of the Code authorize the court to set aside a judgment for mere irregularity, after one year from notice thereof. (*Van Benthuysen v. Lyle*, 8 *How.*, 312.)

The plaintiff's counsel insists that the court has no power to set aside a judgment on motion after one year has elapsed from notice of the entry of judgment.

The "notice" relied upon to bring the case within the provisions of section 174, is, first, a service of notice of retaxation of costs on December 5th, of September, 1871; and, secondly, the information given by the sheriff to

Bissell v. New York Central Railroad Company.

one of the officers of the defendant, that he had an execution on the judgment.

The "notice" referred to in section 174 of the Code means a *written notice*. It is provided by section 408, that "notices shall be in writing." That section has been held to justify the construction that where the word "notice" occurs in the Code, a written notice was intended. (7 *How.*, 108.)

This construction is in harmony with the general rule in respect to notices required by statutory provisions. (*Gilbert v. Columbia T. Co.*, 3 *John. Cases*, 108.) The court says, in that case, "a notice in legal proceedings means a *written notice*." This case is quoted in the elaborate opinion of Justice BACON upon the subject of "notices" in *Lane v. Cary*, (19 *Barb.*, 537,) decided in this district in 1855.

The verbal notice, therefore, to the defendant or its officers cannot be held to cut off the power of the court to interfere with the judgment upon motion. The plaintiff has never given a formal written notice of the judgment, and no good reason can be suggested why a notice of retaxation of costs should be held to cut off a right to have a judgment set aside upon motion, manifestly erroneous, any more than to cut off the aggrieved party from a right to appeal from an erroneous judgment.

A party seeking to hold a judgment by reason of lapse of time, which is erroneous or questionable on the merits, should be held to strict practice. (*Champion v. Plymouth C. Society*, 42 *Barb.*, 441, and cases cited. 60 *Barb.*, 112.)

The notice of motion in this case, in addition to the irregularities complained of, asks for such other and further relief as may be just. Under such a notice it has been repeatedly held that such relief may be given, as the facts presented on the motion warrant. (*Thompson v. Erie R. R. Co.*, opinion by FOLGER, J., 45 *N. Y.*,

Bissell v. New York Central Railroad Company.

476. *The People v. Nostrand*, 46 *id.*, 377, *opinion by* CHURCH, Ch. J.)

The complaint contains allegations against the defendant for having, contrary to "An act to prevent extortion by railroad companies," passed March 27, 1857, charged the plaintiff thirteen cents extra fare from Lockport to Buffalo on 567 occasions, and asks judgment for the excess, and fifty dollars penalty for each violation of the statute aforesaid.

The plaintiff is entitled to recover the excessive fare paid, but is not entitled to recover 567 penalties. The judgment is therefore erroneous ; and for 566 more penalties of fifty dollars each than is allowed by the law of the state, the plaintiff is not entitled to recover in this action. (*Fisher v. N. Y. Cen. and H. R. R. Co.*, 46 *N. Y.*, 644. *Four cases to same effect*, reported 47 *id.*, 678.)

There is no special affidavit of a defense on the merits, and the only defence suggested by the papers now before the court relates to the penalties stated claimed by the plaintiff, and for which he has entered judgment, contrary to the law as laid down by the Court of Appeals ; and considering the great delay and laches of the defendant, it is believed that the court should not open the default, if the plaintiff will stipulate to waive so much of the recovery as exceeds more than one penalty, and the excessive fare and costs.

An order will be allowed providing that the plaintiff may, within twenty days from the service thereof, file with the clerk of Oneida county a stipulation, and serve a copy on the defendants' attorneys, waiving all the recovery except for one penalty and the excessive fare paid, and costs ; and in that event the motion will be denied with \$10 costs, and the judgment and execution shall be reduced to correspond with such stipulation. In case such stipulation shall not be filed and served as aforesaid, then the defendant shall have forty days from the service of the order, to serve an answer, and the

 Brooks v. Moore.

judgment and execution will be set aside, with \$10 costs to the plaintiff. (a)

Order accordingly.

[ONEIDA SPECIAL TERM, October, 1872. *Hardin*, Justice.]

(a) The plaintiff appealed from above order, and the same was *affirmed* at a General Term in the Fourth Department, in January, 1873. Present, *Mullin*, P. J., and *Talcott* and *E. D. Smith*, JJ.

 BROOKS vs. MOORE.

Where the evidence is conflicting, if there is some evidence in support of the verdict, which the jury were authorized to credit, their verdict is conclusive upon the court, on a motion to set it aside.

It is the province of the jury to weigh and determine conflicting evidence; and the court has no right to set aside such verdict as determines in favor of one side or the other represented in such conflict.

An agreement to receive a sum less than an admitted debt, and the receiving of such sum, is not a good accord and satisfaction.

But if there is a *bona fide* dispute as to the sum actually due, or a *bona fide* doubt or controversy as to whether any thing is due, then an accord and satisfaction, or, more properly speaking, a compromise, may be established and held binding, although there is a payment of a sum less than was claimed by the creditor, or even a sum less than, by an actual computation, might be found due to the creditor.

MOTION for a new trial, on a verdict for the defendant, rendered at the circuit in Lewis county.

The action was to recover a balance of \$1,056.04 alleged to remain unpaid on two promissory notes.

The defence was satisfaction by way of property agreed to be accepted, and accepted in payment of these two notes, as well as thirty-six others which were held by the plaintiff against the defendant.

James F. Starbuck and *H. E. Turner*, for the motion.

George W. Smith, opposed.

67	398
74h	70
67	398
92h	73

Brooks v. Moore.

HARDIN, J. There was a question of fact for the jury, in this case, and their finding either way would have been justified by the evidence in the action.

The plaintiff alleged, and testified, that the property was to be taken and applied on the indebtedness of the defendant, at stated prices—as far as the property, at those prices, would pay the indebtedness; and that the balance of the indebtedness should be paid by the defendant, or the payment secured by other property.

The defendant alleged and testified that the plaintiff agreed to receive the property, covered by the written contract between them (except one house and lot reserved by the defendant), as payment of the whole indebtedness.

That question of fact between the parties was submitted to the jury, and the charge of the court called the attention of the jury to the difference between the parties in respect to what the agreement was, and instructed the jury that, if the agreement was found as the plaintiff claimed it to be and testified, then the plaintiff was entitled to a verdict for the balance of the two notes stated in his complaint.

The jury was also instructed that if they found the agreement to be as stated in the evidence of the defendant, then the defendant was entitled to their verdict.

If the question of fact could be considered, as an original question by the court, a conclusion might be reached adverse to that found by the jury. (7 *Wend.*, 384.) But there having been some evidence in support of the verdict, which the jury was authorized to credit, their verdict is conclusive here. (*Morse v. Sherrill*, 63 *Barb.*, 21.)

It was correctly stated by the learned counsel, upon the argument of this motion, that an agreement to receive a sum less than an admitted debt, and the receiving such sum, is not a good accord and satisfaction. (48 *N. Y.*, 204; 48 *id.*, 227-8, and cases cited. 4 *Denio*,

 Brooks v. Moore.

166. 4 *Rob.*, 275. 5 *id.*, 1. 9 *J. R.*, 333. 31 *N. Y.*, 498. 46 *Barb.*, 37. 44 *N. Y.*, 204.)

But if there is a *bona fide* dispute as to the sum actually due, or a *bona fide* doubt or controversy as to whether anything is due, then an accord and satisfaction, or more properly speaking a compromise, may be established and held binding, although there is a payment of a sum less than was claimed by the creditor, or even a sum less than by an actual computation might be found due to the creditor. (4 *Denio*, 166. *Id.*, 189. *Farmers' Bank of Amsterdam v. Blair*, 44 *Barb.*, 652.) In the case last cited BOOKES, J., says: "In such cases it is not admissible to go behind the settlement with a view to determine which of the parties was right. Compromises are to be encouraged, because they promote peace, and where there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not *overlook* the *compromise*, but will *hold the parties* concluded by the settlement." (See 37 *Barb.*, 153; 25 *id.*, 253; 14 *id.*, 690.)

In this case there was no *dispute* as to the indebtedness held by the plaintiff at the time of the agreement, in April, 1872, with the defendant. The question, therefore, to be submitted to the jury was in respect to the difference between the parties, in respect to how the property received by the plaintiff was agreed to be taken, and how it was actually taken. If it was to be taken at stated and agreed prices, then its application would be as so much money, and it would pay only such sum as the stated and agreed prices would aggregate, and the balance between the agreed price, and the total debt would not be paid by it.

But the defendant states that the actual agreement made between the parties, after considerable "talk," or negotiation as to values, was that the property should be surrendered by him (except the one house and lot) in full for his entire indebtedness to the plaintiff. The plaintiff

Brooks v. Moore.

disputes that evidence, and some of the circumstances support the plaintiff's version. So, too, some of the circumstances support the version given by the defendant. The jury have found for the defendant, and a careful reading of the evidence does not permit the court to say that the evidence is insufficient to support the verdict. (63 Barb., 21. Code, § 264.)

There was no exception taken upon the trial. The charge stated, in brief language, the question for the jury, and laid down the law in accordance with the principles of the cases, though not as fully as might be proper to state in a written opinion in respect thereto; there is no ground stated in the charge, as to the law, which is erroneous, or indefinite to the extent that would permit the court, in the absence of any exception, to set aside the verdict, without doing violence to the rules which govern the court in respect to such motions. (*See opinion of POTTER, J.*, 63 Barb., 21.)

The case was very carefully and thoroughly tried by the learned counsel of the plaintiff, and by him fully discussed before the jury, and the evidence was considered by the jury, and their verdict is conclusive here.

It is the province of the jury to weigh and *determine conflicting evidence*; and the court has no right to set aside such verdict as determines in favor of one side or the other represented in such *conflict*. (*Stafford v. Leamy*, 43 How., 40.)

The motion for a new trial must be denied, with \$10 costs, and a copy of this opinion served upon plaintiff's attorney.

[LEWIS SPECIAL TERM, November, 1873. *Hardin*, Justice.]

JOHN M. CARPENTER *vs.* PATRICK O'DOUGHERTY
and others.

If a bond be executed and delivered with a mortgage, a subsequent assignment of the mortgage, which does not include, nor purport to include, the bond, is invalid, if it appears that there was no intention to include the bond also.

But if there was no bond given with the mortgage, then the mortgage is the principal and only security, and the only evidence of indebtedness; and an assignment of it by one having the legal title thereto will give the assignee a good title to the mortgage.

When it appears that a bond was made out at the same time as the mortgage, and that the mortgagee told the mortgagor to keep the bond; and there is some reason to believe that the mortgagee made the mortgagor his *agent*, to keep the custody of the bond; that the retention of the same by the mortgagor was as custodian for the mortgagee; and that the former so understood it; *it seems* this is a good delivery.

Parties may create a lien by delivery of title deeds, or by any other act evincing a clear intention to do so; and the lien will be upheld, as between the parties.

Equity aids the creditor to ripen his lien into effect, and holds the defendant to his agreement.

The defendant entered into an arrangement with the plaintiff for an extension of the time for the payment of a debt he owed the plaintiff, and to secure a judgment; and, as a part of such arrangement, agreed to get from his wife an assignment of a bond and mortgage which he had previously executed, and which his wife held as assignee. He obtained such assignment from his wife, and delivered it to the plaintiff and obtained an extension of the time of payment of his debt, and took up the judgment. *Held*, that by this assignment the wife concluded herself, as to so much of her interest in the mortgage as should be necessary to pay the plaintiff's debt against her husband.

Held, also, that if the wife had no title to the bond and mortgage, then, the defendant being the administrator of the mortgagee, they were assets in his hands, and he could pledge the same to the plaintiff, as he did, by delivering the assignment, and agreeing that the plaintiff should hold the same as security for his debt. That the effect of that transaction was to give the plaintiff a good *lien* upon the land mortgaged, as security for his debt of \$1,300.

Held, further, that if the defendant took title to the premises as heir at law of the mortgagee, the mortgage interest was not merged in the legal title; he having evinced a clear intention that his interest as heir at law should not thus merge.

That the defendant having elected that the mortgage should be regarded as outstanding, so far as should be necessary to secure the plaintiff's debt, equity required him to stand to that election. And that he must be held

Carpenter v. O'Dougherty.

bound by his agreement and acts, and to have given the plaintiff a good and valid lien upon the land, to the extent of the debt mentioned in the assignment.

That he had, by such agreement and acts, created, in favor of the plaintiff, an *equitable mortgage*.

Also *held*, that the title of the plaintiff to the mortgage, and its validity as a lien upon the land described in it, could be upheld upon another principle, viz., that having stood by, and even aided his wife in effecting a transfer of the mortgage as a security, and obtaining further time for the payment of his debt to the plaintiff, the defendant had *estopped* himself from impeaching the validity of the security and defeating the lien thereby created.

THIS is an action to foreclose a mortgage and to declare the plaintiff to have a lien upon the premises described in the complaint, for \$1,300.

The facts are sufficiently stated in the opinion of the court.

John McCartin, for the plaintiff.

D. O. Bruen, for the defendant.

HARDIN, J. The defendant, Patrick O'Dougherty, in July, 1861, made, executed and delivered to his father, John O'Dougherty, his mortgage to secure the payment of \$4,500. In December, 1861, an assignment of the mortgage was prepared by the mortgagor, Patrick, in which it is stated that in consideration of "kindness and attention," the mortgage was assigned "as a *gift* and present" to Anna M. Dougherty (the wife of Patrick.) This assignment described it as "the within mortgage and the bond accompanying it;" and it is in the handwriting of the defendant, Patrick, and executed by his father, John O'Dougherty. That assignment was, on the day of its date, to wit, the 25th of December, 1861, acknowledged by the father before the son, as justice of the peace, and the certificate of the son, as justice of the peace attached to the assignment, and both indorsed on the mortgage. The mort-

Carpenter v. O'Dougherty.

gage was recorded in August, 1861, and the assignment from the mortgagee to the daughter-in-law, Anna, was recorded April 30, 1862.

On the 3d of December, 1867, an assignment was made by Anna to the plaintiff of the *mortgage alone*, to secure \$1,000, and acknowledged, and put on record, the same day.

It is here urged by the learned counsel of the defendant that the assignment to the plaintiff was invalid and inoperative, because it did not purport to, and did not, carry the bond, which is the principal obligation, the mortgage being but the incident.

If we assume that there was a bond made and executed and delivered with the mortgage, then it follows that the defendant's counsel is correct; if it be conceded that there was no intention to assign the bond also. Such is the force of the case of *Merritt v. Bartholick* (36 N. Y., 44.) But if there was no bond given and delivered with the mortgage, then the mortgage was the principal and only security, and the only evidence of indebtedness, and an assignment of it would give the assignee a good title to the mortgage; provided an assignment was made by one having the legal title to the mortgage.

It is said here, in behalf of the defendant, that there was no delivery of the bond; but it appears the bond was made out at the time of the mortgage, and that the father told his son to keep the bond—that he did not care for it; and that he did not in fact take it from the possession of the son. There is some reason to believe that the father made his son his *agent* to keep the custody of the bond, and that the retention of it by the son was as custodian for his father.

Certainly, when Patrick drew the assignment from his father to his wife, he so understood it, and therefore inserted in the assignment a clause referring to and covering the bond.

Carpenter v. O Dougherty.

The father died on the 26th of April, 1862, and the son, Patrick, being the only heir at law, was appointed administrator (in April, 1865,) of his father's estate.

If the assignment by the father to the son's wife is ineffectual, then the mortgage (and bond if ever delivered) was an asset in the hands of Patrick as administrator. Certainly he took title, as administrator, if his wife did not take title to the mortgage through the assignment by the father to her.

The defendant, in 1870, entered into an arrangement with the plaintiff for an extension of the time for the payment of a debt he owed the plaintiff, and to secure a judgment, and, as a part of that arrangement, agreed to get an assignment of the bond and mortgage from the wife. He obtained such an assignment, and delivered it to the plaintiff, and obtained an extension of the time of payment of his debt, and he took up the judgment held by the plaintiff.

By the assignment of 1870 of the bond and mortgage, the wife concluded herself as to so much of any title she had to the mortgage (if any) as should be necessary to pay the plaintiff's debt against her husband.

If she had no title to the mortgage or bond, because they were never delivered to her by John, then, as before stated, the mortgage (and bond if delivered) were assets in the hands of the administrator, and he could pledge the same, as he expressly agreed to do, and did do, in the arrangement he made in 1870 with the plaintiff, and by delivery of the assignment made by his wife, and the agreement that the plaintiff should hold the same as a security upon his lands for \$1,300. The effect of that transaction was to give the plaintiff a good *lien* upon the real estate, as security for his debt of \$1,300.

Parties may create a lien by delivery of title deeds, or by any other act evincing a clear intention to do so. And the lien will be upheld, as between the parties.

Equity aids the creditor to ripen his lien into effect, and holds the defendant to his agreement. (*Rockwell v. Hobby*, 2 Sandf. Ch., 9. 8 Abb., 167. 22 N. Y., 386. *James v. Morey*, 2 Cowen, 246.)

But the defendant's counsel insists that Patrick took title to the mortgage as heir at law of his father, and that as he had the legal title, the mortgage interest merged with the legal estate.

As he took title, if at all, as heir at law, and through the operation of law, it may be said that by his pledging the mortgage as a security for his debt, he evinced a clear intention that his interest as heir at law should not thus merge. Certainly, as long as he held title as administrator, the title to or interest in virtue of the mortgage would not merge. His acts as well as his position as to the mortgage, at the time of the making of the arrangement in 1870 with the plaintiff, forbid his insisting upon a merger. (*Clift v. White*, 12 N. Y., 519.) He elected that the mortgage should be regarded as outstanding, so far as should be necessary to secure to the plaintiff the \$1,300 debt. That election equity requires him to stand to; and he must be held bound by his agreement and acts, and to have given the plaintiff a good and valid lien upon his lands, to the extent required to secure the debt and interest mentioned in the assignment of 1870, and assented to by him in the arrangement made by him, and consummated by delivering over the instrument executed by his wife.

In any view of the defendant's position, as shown by the evidence upon the trial, it is proper to hold him to have given the plaintiff a good lien upon the real estate described in the complaint. He created, in favor of the plaintiff, an equitable mortgage. (2 Sandf. Ch., 9. 1 Vesey, 258.)

But, another principle, as against Patrick, upholds the title of the plaintiff to the mortgage, and its validity as a lien upon the defendant's lands. Patrick stood by,

Carpenter v. O'Dougherty.

may more, he aided his wife in effecting a transfer of the mortgage as a security to the plaintiff, and to obtain further time from the plaintiff for the payment of the plaintiff's debt; and he thereby estopped himself from impeaching the validity of the security the plaintiff was thus induced to accept. (1 *John. Ch.*, 343. 21 *Wend.*, 94. *Tilton v. Nelson*, 27 *Barb.*, 595. 2 *N. Y.*, 278. 9 *id.*, 40.)

The defendant Patrick, in 1870, in effect, assured the plaintiff that the assignment he then delivered to the plaintiff would, in case of failure to pay, authorize the collection of the \$1,300 debt, out of his real estate; and that assurance was believed by the plaintiff, and forbearance given, as well as the relinquishment of a judgment; and now the defendant is estopped from defeating the lien he thereby created.

A judgment may be entered in favor of the plaintiff, declaring that he has a lien upon the premises described in the complaint; for the debt and interest; and that the plaintiff is entitled to costs to be taxed. And as the questions of law have been such that the case is an exception to the ordinary foreclosure cases, the plaintiff may have a further allowance of two and one-half per cent. upon the amount of the recovery.

Judgment accordingly.(a)

[JEFFERSON SPECIAL TERM, March, 1878. *Hardin*, Justice.]

(a) *Affirmed* at a General Term in the 4th Department.

SMITH *vs.* MERRIAM AND PINKERTON.

Under the mechanics' lien law of 1864 applicable to Onondaga county, proof of payments made by the owner to a contractor defeats or avoids the lien created by the first part of section 1.

To defeat the effect of the statute, the owner is allowed to show that payment has been made, "without notice" of the lien, of all that he became liable to pay. Hence the *onus* of showing payments which will extinguish the lien is upon the owner.

The owner is entitled to be credited with the amount of promissory notes made by the contractor, and indorsed by the owner, which became due and were taken up as payments upon the building contract, before the notice of lien was filed.

It is not absolutely necessary that such notes should have been charged up in the account. It is enough if the contractor has received the money upon the notes, or credit for them, and the owner of the building has become indisputably liable to pay them, by virtue of his agreement and indorsement thereof.

Such a transaction is an agreement by the owner to pay his debt in a particular manner, and is binding upon him.

From the time such agreement is made to pay the notes, as well as from the time of their actual payment by the owner, he is entitled to have them treated as payments upon the building contract existing between him and the contractor.

THE plaintiff furnished materials to one Pinkerton to be used, and which were used, in the construction of a dwelling house for Merriam. The dwelling was constructed in part, in pursuance of an agreement to pay \$2,450. The notice of lien on which the plaintiff instituted proceedings under the mechanics' lien law applicable to Onondaga county, (*Laws of 1864, p. 856,*) to foreclose such lien, was filed with the clerk of Onondaga county, July 3, 1872. Soon afterwards, Pinkerton learned that the notice had been filed, and then abandoned the contract, and the owner was obliged to complete it, at considerable expense. Pinkerton received payments from time to time, as he was engaged on the building, and prior to the filing of the notice, amounting to \$660.91. On the 2d of March, 1872, Pinkerton made his note for \$500 to the order of Merriam and Gregory at two months, with interest. It fell due

Smith v. Merriam.

5th May, and amounted to \$506.12. Pinkerton also, on the 23d April, 1872, made another note for \$500 at two months, with interest, which fell due on the 26th of June, 1872, and amounted to \$516.24.

H. Burdick, for the plaintiff.

C. B. Sedgwick, for Merriam.

HARDIN, J. It is declared by chapter 366 of the Laws of 1864, that in the county of Onondaga, "any person who shall, in pursuance of any contract, express or implied, either with the owner of the property or any contractor, perform any labor, or furnish any materials, in building, altering or repairing any house or other building, &c., * * shall, until the end of three months after the performance of such labor, be deemed to have *an equitable* lien for the same upon such house or building or appurtenances, and the land upon which the same may be situated." (§ 1.) And it is further provided by the amendment of 1866, that when such labor or material is performed or furnished to a contractor or sub-contractor, *all* payments made by the owner to either in good faith, to apply on his contract, *shall* operate to extinguish the lien aforesaid, unless written notice of the lien is served on the owner of the premises before such payment, stating that the same is *then* or immediately thereafter will be claimed." (*Laws of 1866, ch. 788, § 1.*)

The notice sufficiently states that at the date of it there was claimed a lien to the amount of "\$800 for large quantities of lumber furnished to, and used by the said James Pinkerton," within thirty days next preceding the 3d of July, 1872.

The only important question presented by the proofs in this case relates to the amount of payments which

Smith v. Merriam.

had been made by the owner prior to the 3d of July, 1872.

The plaintiff makes no question in respect to the payments to the extent of \$660.91, but questions the payment claimed to have been made prior to 3d of July, of any further sum.

Pinkerton, as a witness, if credited to the fullest extent, would carry out the plaintiff's theory that on the 3d of July there remained unpaid all but the sum of \$660.91.

The testimony of Merriam, corroborated to some extent by Gregory and Cummings, is to the effect that the notes were indorsed and taken up as payments upon the contract in question.

It was held, in *Cox v. Broderick*, (4 E. D. Smith, 721,) that it must be shown by the party seeking to establish a lien, "that money was due from the owner at the time the lien was filed, or had subsequently become due." (See 1 E. D. Smith, 647.)

But that case arose under a statute in language unlike the one which applies in Onondaga county. It is declared by the act quoted from, (*supra*), that the party "*shall have a lien*," and the lien may be defeated by showing that payments were made *before* notice, or, in the words of the statute, "unless written notice of the lien is served on the owner of the premises before such payment."

The proof of payments before notice, defeats or avoids the lien created by the first part of the section. To defeat the effect of the statute, the owner is allowed to show that payments have been made "without notice," of all that he became liable to pay. The *onus*, therefore, of showing payments which will extinguish the lien, is upon the owner.

As before seen, the contract price was \$2,450; the actual payments, as to which there is no dispute, were \$660.91; and the question left to be disposed of upon

Smith v Merriam.

the conflicting evidence relates to the two notes of \$500 each.

It has been held that a party may set off claims arising out of other matters, when proceedings are instituted to enforce a mechanics' lien. (*Owens v. Ackerson*, 1 *E. D. Smith*, 691.)

It was held in *Allen v. Carman*, (1 *E. D. Smith*, 692,) that where, in pursuance of a mutual understanding, a debt due the owner from the contractor was to be turned upon the work, such understanding and debt were equivalent to an actual payment.

The same doctrine was asserted by COWEN, J., in *Miner v. Hoyt*, (4 *Hill*, 193.)

Applying these cases to the proofs here, the conclusion is reached that when the notice was filed by the claimant, there was nothing due from the defendant Merriam to the contractor Pinkerton.

It was not absolutely necessary that the notes should have been charged up in the account; it is enough to know that Pinkerton had received the money upon the notes, or credit for them; that Merriam had become indisputably liable to pay them, in virtue of his agreement and indorsement thereof. It was an agreement made by him to pay his debt in a particular mode, and was binding upon him. (*Lawrence v. Fox*, 20 *N. Y.*, 268. 43 *Barb.*, 522. 4 *N. Y.*, 233.)

From the time such agreement was made to pay the two notes, as well as from the time of their actual payment by Merriam, he was entitled to have them treated as payments upon the building contract existing between him and Pinkerton.

It follows, therefore, that by payments made before the 3d of July, 1872, Merriam had so far liquidated and satisfied his indebtedness to Pinkerton, or discharged the lien upon his premises, as to preclude Smith from enforcing out of the premises payment of the demand stated in the notice filed.

Pardee v. Fish.

There must, therefore, be a judgment in favor of Merriam, with costs, and the plaintiff may have judgment against Pinkerton for the amount of the account, and interest from 3d of July, 1872, with costs.

Judgment accordingly.

[ONONDAGA SPECIAL TERM, April, 1873. *Hardin*, Justice.]

AMOS R. PARDEE vs. DAVID FISH.

Upon a certificate of deposit, payable to the order of the depositor, in current funds, on the return of such certificate, with interest, which is indorsed and transferred by the depositor, an action can be maintained by the indorsee, against the indorser, after demand of payment at the bank and notice of dishonor.

A JURY having been waived, the parties proved before the court that on the 11th day of May, 1872, the People's Savings Bank, the People's Safe Deposit and Savings Institution of the State of New York, at Syracuse, issued to the defendant a certificate, in the following words, viz.: "Mr. David Fish has deposited in this bank six hundred and one dollars, payable to the order of himself in current notes, on the return of this certificate, *with interest* at seven per cent. per annum."

That on the 5th of June, 1872, Fish indorsed and transferred the same to the plaintiff; that on the 11th day of September, 1872, said bank suspended; that on the 12th of September it was declared a bankrupt; and that on the 24th of December, 1872, the plaintiff caused a demand and protest to be made, and a notice of dishonor to be given to the defendant.

George Barrow, for the plaintiff.

Lyman & James, for the defendant.

Pardee v. Fish.

HARDIN, J. If the instrument upon which the defendant placed his indorsement is a promissory note, draft or bill of exchange, and the notice was given him of its dishonor, the principle of *Merritt v. Todd* (23 *N. Y.*, 28,) would justify the court in holding that the defendant placed his name upon a lasting security, and was therefore liable.

That case was not followed in *Howland v. Edmonds*, (24 *N. Y.*, 307,) nor was it anywhere referred to in the opinion of the court, either in the Court of Appeals, or in the opinions delivered in the General Term in this district. (33 *Barb.*, 433, *S. C.*)

Merritt v. Todd has been very much criticized and commented upon—not to say questioned—in subsequent cases. (36 *Barb.*, 637. 41 *N. Y.*, 587, by FOSTER, J. 29 *id.*, 172, by MULLIN, J. 47 *id.*, 519, by PECKHAM, J. 50 *Barb.*, 334, by BALCOM, J.)

These cases do not, in terms, overrule *Merritt v. Todd*, but they shake the reasoning, somewhat, of the very accomplished jurist who delivered the leading opinion of the court. They hold that the case is an authority to be limited rather than enlarged.

By these cases it seems to be settled that a demand note, with or without interest, is liable to have applied to it the statute of limitations, as from its date rather than from the time of a demand. (*See opinion of PECKHAM, J.*, 47 *N. Y.*, 520.)

The instrument which was transferred to the plaintiff by the defendant was, in terms and in legal effect, a certificate of deposit. It, in terms and effect, resembles the one considered by MULLIN, J., in his very exhaustive opinion in *Payne v. Gardner*, (29 *N. Y.*, 168.)

It was evidence of a deposit, not a loan to the bank. As was held in *Hotchkiss v. Mosher*, (48 *N. Y.*, 478,) it was an evidence of debt, in the nature of a receipt. (*See opinion of LEONARD, J.*, *id.*)

It was held that the indorser of such an instrument,

Pardee v. Fish.

merely gave to the transferee an equitable assignment, in the case of *Patterson v. Poindexter*, (6 *Watts & Sergeant*, 227. *S. C.*, 6 *Law Reporter*, 541.) The certificate in that case is like the one here, in every essential particular, except that it was payable twelve months after date, whereas the one here is payable upon its return.

The reasoning of GIBSON, J., is, however, equally applicable to the instrument under consideration. He says: "For purposes of transfer merely, it was payable to order; for purposes of commercial responsibility, it was not negotiable. It was a special agreement to pay the deposit to any one who should present the depositor's order, attended by the certificate." (6 *L. R.*, 546.)

That case was decided by the Supreme Court of Pennsylvania in 1843, and was cited in the very able argument of the late Chief Justice Chase, while at the bar, in the case of *Miller v. Austin et al.*, (13 *How. U. S. Rep.*, 218.)

In this last case, CATRON, J., in delivering the opinion of the court upon a certificate very like the one here, says: "Every reason exists why the indorser of this paper should be held responsible to his indorsee that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note, the state courts generally have treated certificates of deposits payable to order." And he concludes that the plaintiff, the holder, was entitled to recover against the indorser, to whom notice was given upon the day when, by its terms, the certificate he had indorsed was payable.

In *Barnes v. Ontario Bank and Hollister*, (19 *N. Y.*, 152,) which originated in this district, it was held that a *bona fide* holder of a certificate of deposit could recover against the bank, though the cashier had put the certificate in circulation with the fraudulent design of diverting the funds of the bank; and that an indorser was

Pardee v. Fish.

also liable upon such certificate. It is said by the court, at page 159, that "a certificate is a promissory note ;" and again, at page 168, that "the certificate was a negotiable instrument." * * (*Opinion of ALLEN, J. Also see 2 Hill, 295, 3 Comst., 19.*)

It was urged by the learned counsel for the defendant, that although the instrument in question should be held to be a promissory note, still that the demand and notice of protest were not made within a reasonable time, and therefore the indorser was discharged by the laches of the holder.

Had the instrument been without *interest*, *Alexander v. Parsons* (3 *Lans.*, 333,) would have been an authority supporting the defence. JOHNSON, J., in delivering the opinion, refers to *Merritt v. Todd*, (*supra*,) and concludes that in case of a note payable without interest, "payment must be demanded of the maker before the time has arrived at which the note will be regarded as overdue and dishonored." (*Id.*, p. 337.)

The distinctions pointed out in *Alexander v. Parsons*, and in *Wheeler v. Warner*, (47 *N. Y.*, 519,) from the case of *Merritt v. Todd*, do not exist in this case, and such respect is due to *Merritt v. Todd*, and *Miller v. Austin*, (*supra*,) as to require this court to follow them, and the principles established by them, in disposing of this case.

Judgment is ordered for the plaintiff. (a)

[ONONDAGA SPECIAL TERM, May, 1873. *Hardin, J.*]

(a) *Affirmed* at a General Term in 4th Department, and subsequently by Court of Appeals. See 60 *N. Y.*, 265.

JOHN CARPENTER vs. ANDREW COE.

Newly discovered evidence which goes to discredit a witness is not a ground for a new trial. Evidence which is only material or admissible to contradict the evidence of a witness, and to render him unworthy of confidence, is insufficient.

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Motions for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court, but the discretion to be exercised must be guided and governed by legal principles, and controlled by the established authorities.

A new trial will not be granted to enable the defendant to prove admissions made by a witness for the plaintiff, inconsistent with the testimony given by him upon the trial; where there is sufficient evidence, if credited, independent of his testimony, to support a verdict for the plaintiff.

MOTION by the defendant for a new trial, upon the grounds of newly discovered evidence and surprise. The case has been heard twice before a jury. On the first trial, the jury disagreed; the second trial resulted in a verdict for the plaintiff for the amount of the note sued on.

The defence alleged that the note was a forgery. There was evidence from four witnesses that it was in the defendant's handwriting, and of four witnesses that it was not in his handwriting; of Stacy that he saw it signed by the defendant; and the defendant testified he never gave it. The plaintiff called Taylor, who testified to a conversation with the defendant, in which the latter *admitted the giving of the note*. The defendant denied he ever had such a conversation. There were some other circumstances bearing upon the issues, introduced by the parties, at the trial. Affidavits were read for, and opposed to, the motion.

E. Allen and S. C. Huntington, for the motion.

J. B. Higgins, opposed.

HARDIN, J. When this cause was tried before the jury, there was a great conflict in the evidence, and

Carpenter v. Coe.

sufficient evidence was produced by the plaintiff, if credited, independent of the witness Taylor, to support a verdict in favor of the plaintiff.

The evidence given by Taylor was very material and important. The defendant, upon his oath, disputed the evidence of Taylor. The principal parts of the affidavits produced upon the motion disclose certain admissions of Taylor inconsistent with the evidence given by him upon the stand as a witness.

It is too well settled to admit of doubt, that newly discovered evidence which goes to discredit a witness is not a ground for a new trial. (3 *John.*, 255. 4 *id.*, 425. 2 *Denio*, 109. 7 *Barb.*, 271. 11 *id.*, 215. 10 *How. Pr.*, 297.)

Here, as in the case of *Harrington v. Bigelow*, (2 *Denio*, 109,) the newly discovered evidence is only material or admissible to contradict the evidence of the witness, and to render him unworthy of confidence. In *Meakim v. Anderson*, (11 *Barb.*, 223,) KING, J., says: "The testimony which he claims to have discovered since the trial is that of his own son and daughter, *and only* tends to impeach Thompson's statement that he had never seen his sister after his paying the money to the plaintiff. It is testimony, therefore, to impeach the witness; *and such testimony does not furnish the ground for a new trial.*"

The learned counsel for the defendant pressed upon the attention of the court, very ingeniously, the case of *Oakley v. Sears*, (1 *Robert.*, 73.) The question litigated there was in reference to the knowledge with which the plaintiff took a check. It became a very material point in the case, in behalf of the defendant, to show that the plaintiff was not a *bona fide* holder for value, without *actual knowledge* that the check was given for an accommodation conditionally. The court very properly held that the "declarations of the plaintiff that he knew the check was so made and was to be so used, are competent

Carpenter v. Coe.

evidence to establish the same fact, and is *none the less evidence in chief* because it may tend to impeach."

It therefore appears that the case is no exception to the general rule laid down and sustained by the other cases already cited.

In the case of *Duryee v. Dennison*, (5 John., 249,) the witness had made statements inconsistent with his evidence; and Kent, Ch. J., delivered an opinion to the effect "that it would be productive of the most dangerous consequences if a verdict should be set aside because a witness had made a mistake in giving his evidence." In that case the witness, by his conversations, showed that his evidence was not accurately given. It was a case where the attempt was to impeach the testimony given; not the general character of the witness; and it failed. The case is approved in 5 Cowen, 123, and the principle applied in *Powell v. Jones*, (42 Barb., 24.)

The case of *Tyler v. Hornbeck*, (48 Barb., 197,) is in harmony with the other cases; for the court there rested its decision upon the *surprise* produced by the *violation of an agreement* not to call a certain witness.

In *Simmons v. Fay*, (1 E. D. Smith, 107,) the court held that the new evidence in respect to what the full conversations were in which the alleged false representations were made was good ground for a new trial; especially as the witness who testified at the trial said "he did not remember the whole talk had." The case is not in point here, and does not reach the question involved in this motion.

Nor does the case of *Guyott v. Butts* (4 Wend., 579,) aid the defendant. It was there held that, in ordinary cases, a new trial would not be granted to let in admissions of parties; and MARCY, J., says, the chief reasons for granting a new trial in that case were that the action was upon a stale demand, and against executors, and the new proof was of a distinct and independent character from that given upon the trial.

Carpenter v. Coe.

This motion is addressed to the discretion of the court, but the discretion to be exercised must be guided and governed by legal principles, and controlled by the established authorities. (34 Barb., 294.)

The defendant has had two trials; and in the last one, a full investigation of the evidence, circumstantial and secondary, as well as the direct and positive, led the jury to the side of the plaintiff.

It is true that the verdict is against the defence attempted, and in disregard of the positive denial of the genuineness of the note, by the defendant as a witness; but it must be borne in mind that the positive and direct testimony of the witness Stacy supports the verdict, as do also some of the circumstances surrounding the note, and the opinions of the witnesses who were called to establish the genuineness of the defendant's signature to the note upon which the verdict is predicated.

To meet this motion, the plaintiff produced the affidavit of Taylor, and that is also entitled to some consideration in determining the questions raised by the affidavits produced by the defendant.

Considering all the evidence produced at the trial, and the affidavits read upon this motion, the court is not able to reach the conclusion that the ends of justice, and the rules of law applicable to the questions presented, require a new and further trial.

The motion is denied, with costs.

[ONEIDA SPECIAL TERM, July, 1878. Hardin, Justice.]

**ARTHUR B. JOHNSON and another vs. THE UTICA
WATER WORKS COMPANY.**

The defendant was, by its charter, authorized and empowered, "for the purpose of supplying the city of Utica with pure and wholesome water," to purchase, take and hold any real estate, and to enter upon any lands necessary for that purpose, and to take the water from any springs, ponds, streams, &c., and divert and convey the same to that city; and to lay and construct any pipes, conduits, reservoirs, &c., proper for said purpose, upon any of such lands, after having caused a survey and map of the lands to be made and filed. And in case of failure to agree with the owners of lands or water, for the purchase thereof, provision was made for the appointment of commissioners to ascertain and determine the compensation. The company made and filed a map, and, in 1849, took proceedings for the acquisition of so much water as would flow through an aperture twelve inches in diameter, stating that so much water was necessary; and acquired it, having paid the damages assessed therefor. Subsequently it became necessary for the company to obtain an increased quantity of water to supply the city, and that it should have the right to take additional water for that purpose.

- Held*, 1. That in the absence of any words in the defendant's charter limiting its right to purchase or acquire lands or water, to one instance, or to one set of proceedings, or limiting the extent of its acquisition, other than to the purposes contemplated in the charter, the power to acquire lands and water for those purposes was not spent, nor the statute exhausted, by one exercise thereof.
2. That the charter did not provide for one, only, but for successive, *purchases*, and successive *acquisitions*.
 3. That the object or purpose to be attained by means of the incorporation was continuous; and the right to acquire lands by the right of eminent domain was designed to be compulsory, to enable the company to accomplish the full purpose of its incorporation.
 4. That there was no limit as to the time, or number of times, when the power could be exercised, if exercised for the purpose of effectuating the object of the defendant's incorporation.
 5. That the company did not, by its proceedings, in 1849, to acquire so much water as would flow through an orifice twelve inches in diameter, exhaust the right to acquire additional water; provided it had need thereof "for the purpose of supplying the city of Utica with pure and wholesome water."

TRIAL by the court without a jury. The action was brought to restrain the defendant by injunction.

The plaintiffs are seised in fee of certain lands situate in the town of Frankfort, through which the waters of Starch Factory creek have been accustomed to flow for more than twenty years, in passing into the Mohawk

Johnson v. Utica Water Works Company.

river. On the 31st of March, 1848, the defendant, "The Utica Water Works Company," was duly incorporated by an act of the legislature, entitled "An act to incorporate the Utica Water Works Company." (*Laws of 1848, chap. 154.*)

Additional powers in respect to towns adjacent to the city were conferred upon the defendant by an act passed in 1853. In 1849, the Utica Water Works Company applied to this court for the appointment of commissioners, under their charter, to assess the damages sustained by Edward Gilbert and others, by reason of the taking of so much water from said streams as would flow through an aperture twelve inches in diameter, in the clear. The damages assessed were paid, and the company has enjoyed the use of such water.

The population of the city of Utica, in 1850, was 17,565, and now it is between 30,000 and 35,000, and increasing. Prior to 1851, the company laid down about six miles of cast iron pipe, to distribute the water from a reservoir. Since that time, it has laid down about five miles of pipe.

In 1868, the company made a contract with the city (pursuant to chap. 393, of Laws of 1867,) to supply it with water for the purpose of extinguishing fires. In 1868 the city required the company to make a new distributing reservoir, and the company laid about ten miles of additional pipe, making an expenditure therefor of about \$130,000. There has been laid, since the contract aforesaid, about eight additional miles of pipe.

The defendant's works, during the last three years, have proved inadequate and insufficient to permit a constant supply of water to extinguish fires and supply the inhabitants who are now using the same; and it is conceded that "it is necessary that the company should construct additional reservoirs for receiving and storing water, and should have the right to take additional water over that now and heretofore used by the com-

Johnson v. Utica Water Works Company.

pany, to enable it to furnish the city with a constant supply to extinguish fires, and also to furnish a constant supply to its inhabitants." (*See Stip.*)

The act of 1867 (chap. 393) authorizes the common council to contract with the Water Works Company for a sufficient supply of water to extinguish fires; and declares that "Said Water Works Company *SHALL*, when such contract is made, furnish water to the city of Utica for the purpose of extinguishing fires, and *shall* lay and extend its pipes and conduits in such streets as the common council *shall* designate, and *provide suitable* reservoirs to *constantly supply* said city with sufficient water for the extinguishment of fires."

A contract has been made by the Water Works Company, with the city, and the duty imposed by the statute now rests upon the Water Works Company.

Waterman & Hunt, for the plaintiffs.

Francis Kernan and *John F. Seymour*, for the defendant.

HARDIN, J. The trial of this action presented for the decision of the court only one question, and that arises upon a conceded state of facts.

The learned counsel for the plaintiffs insist, that inasmuch as the Water Works Company, in 1849, filed a map, and took proceedings for the acquisition of so much water as will flow through an aperture twelve inches in diameter, in the clear, and then stated that so much water was necessary, and acquired it, the power to acquire any other water, springs or streams, is gone, the statute has been exhausted, and the company is now only permitted to acquire further water by means of purchase.

The eighth section of the defendant's charter provides as follows:

Johnson v. Utica Water Works Company.

“§ 8. For the purpose of supplying the said city of Utica with pure and wholesome water, the said company may purchase, take and hold *any* real estate, *and* by their directors, agents and servants, or other persons employed, may enter upon the lands of *any* person or persons which *may be necessary for said purpose*, and may take the water from *any* springs, ponds, fountains or streams, and divert and convey the same to said city, and may lay and construct any pipes, conduits, aqueducts, wells, reservoirs, or other works or machinery necessary or proper for said purpose, upon any lands so entered upon, purchased, *taken* or had; but the said company shall not convey or divert any water from the Saquoit creek.” * * *

The ninth section provides that before entering, taking and using any land for the purposes of the act, the directors shall cause a survey and map to be made, of the lands intended to be taken or entered upon for any of said purposes, by which the land of *each* owner or occupant, intended to be taken or used, shall be designated * * * and be filed in the office of the clerk of the county of Oneida.”

Then follows a provision in respect to *lands or water* which may be taken by the company by proceedings similar to those provided for condemning lands for railroad purposes.

The tenth section provides that “in case the said company cannot agree with the land owners and occupants of *any lands or water* allowed to be taken or used as aforesaid, for the purchase thereof, the directors may apply to the Supreme Court, at any term or session thereof held in the fifth judicial district, for the appointment of three commissioners, by whom the compensation for the damages suffered or to be suffered by any person or persons, by reason of taking said lands or water and constructing *any* of the works of said company, shall be ascertained and determined.”

Johnson v. Utica Water Works Company.

The 12th section provides that "upon payment or legal tender of the compensation awarded by the said commissioners * * the company shall be entitled to enter upon, *for the purposes contemplated by this act*, all the lands and real estate for which said compensation shall be paid or tendered as aforesaid, and to *hold* and use the same, for the said purposes, to them and their successors FOREVER."

The 16th section declares, "the said company *shall* furnish water to the city of Utica for the purpose of extinguishing fires, upon such terms as may be agreed upon."

The language of the 8th and 10th sections of the charter obviously authorize the acquisition of the lands of different owners or occupants; and it is equally clear that water owned by different persons in severalty may be purchased, or acquired by means of resort to the right of eminent domain delegated to the company.

Not only does the charter provide for one, but for successive *purchases*, and successive *acquisitions*. If further evidence was required than that furnished by the language quoted, it may be found in a subsequent part of section 10, which provides for notice to be served upon "the owners of said land and water."

No part of the charter, in terms expressly, or inferentially, limits the right of the company to acquire lands or water, to one instance, nor to one set of proceedings. The only restriction placed upon the company relates to the purposes of the incorporation. The great and leading purpose of the corporation is to supply the city "with pure and wholesome water."

The language of the 8th section authorizes the company to take and hold the water from "any springs, ponds, fountains, or streams," for "the purpose of *supplying* the said city of Utica," with pure and wholesome water.

The use of the word "supplying" favors the idea

Johnson v. Utica Water Works Company.

that the company is authorized to keep a continuous *supply*, as time and circumstances shall require. The section suggests to the mind the same idea as though it had read, "For the purpose of keeping up a supply of water for the city of Utica."

It is the "purpose contemplated by the act;" and for that purpose the 12th section declares that after payment of the compensation awarded by the commissioners, the company "shall be entitled to enter upon all the lands, *waters* and real estate for which such compensation shall be paid, and to hold and use the same, for the said purposes, to them and their successors forever."

In *Bruce v. Delaware and Hudson Canal Co.*, (19 Barb., 376,) a question was presented to the court in respect to the power of the company to acquire additional lands, and to make additional excavations to deepen their canal, rendered necessary after its completion, by an increasing demand for its use, to effect the purposes of its construction and incorporation. The court says: "The question is to be determined in reference to the object which the legislature contemplated when they granted to the defendants their charter. * * They were to construct and forever maintain a canal whose capacity should be suitable to this object." After stating a series of expenditures which had been made, to increase the capacity of the canal, (and the like fact appears in this case,) HARRIS, J., adds: "There is nothing in the language of the charter which leads me to suppose that the legislature intended that the defendant should, *once for all*, determine the size of their canal, and that, having constructed it of the limited dimensions first adopted, they should not be at liberty, whatever the necessity, *subsequently* to enlarge it."

As has already been shown, there are no words in the charter of the Water Works Company limiting its rights to purchase or acquire lands or water to one instance,

Johnson v. Utica Water Works Company.

nor limiting the extent of its acquisition, other than to the purposes contemplated by the act of incorporation. "The purpose of supplying the city of Utica with pure and wholesome water," may be said to be quite as continuous and lasting as "the purpose of supplying the city of New York and other parts of the state with coal." Therefore the reasoning of the court in *Brucce v. Delaware and Hudson Canal Co.* is applicable in this case. That case was approved, at General Term, in 1855, in *Selden v. Same Company*, (24 Barb., 362;) and in 1864, the latter case was affirmed by the Court of Appeals, (29 N. Y., 638;) where it was expressly determined that "the company did possess the power to enlarge, and could, if necessary, appropriate lands for that purpose, under the exercise of the power of super-eminent domain conceded to them in the charter." (*Id.*, 638.)

It was held, in the *C. B. and Q. R. R. Co. v. Wilson*, (17 Ill. Rep., 123,) that a grant to a railroad company, to construct a railroad with such appendages as it may deem necessary for the convenient use of the same, will authorize them to take lands compulsorily, for *work shops*. And this power is not exhausted by the *apparent completion* of the road. If an *increase* of business shall require other appendages, or more room for tracks, it may in like manner be taken, *toties quoties*. (*South Carolina R. R. Co. v. Blake*, 9 Rich., 228. *Redfield on Railw.*, 72, 122.)

The duty imposed by the charter upon the Water Works Company, to supply the fire department with water to extinguish fires, favors the construction already given, that the object or purpose to be attained by means of the incorporation is continuous, and that the right to acquire lands by the power of eminent domain was designed to be compulsory, to enable it to accomplish the full purpose of its incorporation.

There is no limit as to time or number of times, when

Johnson v. Utica Water Works Company.

the power may be exercised, if for the purpose of effectuating the object of the incorporation of the defendant.

The right or power of eminent domain rests with the legislature. "It may be exercised by means of a statute which shall at once designate the property to be appropriated, and the *purpose* of the appropriation; or it may be delegated to public officers, or, as it has been, repeatedly, to private corporations established to *carry on enterprises* in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. The necessity for appropriating private property for the use of the public, or of the government, is not a judicial question." (*Per Denio, J., in People v. Smith*, 21 N. Y., 598. See N. Y. and Harlem R. R. Co. v. *Kip*, 46 *id.*, 552.)

It follows from the views already expressed, that the company did not, by the proceedings in 1849, to acquire so much water as would flow through an orifice twelve inches in diameter, exhaust its right to acquire further water, provided it has need thereof, "for the purpose of supplying the city of Utica with pure and wholesome water."

Whether that necessity exists, can be determined at the proper time, but the question does not arise here. (*Rensselaer and Saratoga R. R. Co. v. Davis*, 43 N. Y., 137. N. Y. and Harlem R. R. Co. v. *Kip*, 46 *id.*, 551. *Dwarris on Stat. by Potter*, 383.)

Judgment is ordered for the defendant upon the issues raised and considered on the trial. The other questions are reserved for a further hearing.

[ONEIDA SPECIAL TERM, October, 1873. *Hardin*, Justices.]

THE CHITTENANGO COTTON COMPANY vs. STEWART,
executor, &c., and others.

The death of a defendant, after an order of reference, and the revival of the action in the name of his representatives, do not operate to vacate the order of reference.

And the defendants, by appearing before the referee and commencing the trial, will be deemed to have waived the right to object to the validity of the reference on the ground of such death and revival in the name of the representatives.

The power of a referee, to allow amendments, is not as great as the power of the court at Special Term. His power is restricted, like that of the court at circuit.

An amendment of the summons and complaint which, in effect, strikes out the name of the plaintiff and substitutes another in his place should be applied for at Special Term. The power to grant it is not with the referee.

Whenever such an amendment becomes necessary, the referee may suspend the trial; or grant an adjournment, and allow the application to be made at Special Term, for leave to amend.

The decision of a referee is reviewable on motion, as well as upon appeal.

The court may exercise the power to strike out parties, under section 178 of the Code.

BY consent of parties, this action was referred, and after the reference the defendant died, and the action has been revived against his executors.

The referee allowed an amendment of the summons and complaint so as to change the party plaintiff from "Ebenezer Pennock, President of the Chittenango Cotton Company" to "The Chittenango Cotton Company."

After the amendment was allowed, the complaint, as thus allowed to be amended, was served, the defendants served an amended answer, and the plaintiff replied.

The defendants now move to vacate the reference, and for other relief.

W. C. Ruger, for the motion.

Lansing & Kellogg, opposed.

HARDIN, J. 1. The death of the defendant, and the revival of the action in the name of the personal repre-

Chittenango Cotton Co. v. Stewart.

sentatives, do not operate to vacate the order of reference; and the defendants, after appearing before the referee and commencing the trial, have waived the right to object to the validity of the reference on the ground of such death, and revival in the name of the representatives.

In *Moore v. Hamilton*, (44 N. Y., 673,) LEONARD, C., says: "The order of reference was not affected by the death, or the substitution of the new party;" and at page 672 he also says: "The new or substituted party takes the place of the former one, and the case is revived and proceeds, in all respects, as if the new party had been in the case from the beginning. The pleadings remain the same, and all the prior proceedings are valid and operative."

2. This action was brought in the name of Ebenezer Pennock, president of the Chittenango Cotton Co., and the amendment allowed by the referee, in effect, strikes out the name of the plaintiff and substitutes another in his place, in analogy to the course prescribed by the Court of Appeals in *Bank of Havana v. Magee*, (20 N. Y., 360, 363.)

As the action was brought, it is quite clear, as the referee held, that the plaintiff could not recover. (*Lowenthal v. Wiseman*, 56 Barb., 490; 20 N. Y., 360.)

But the power of the referee to allow amendments is not as great as the power of the court at Special Term. His power is restricted, like the power of the court at circuit. The more recent authorities seem to agree that such an amendment as was allowed in this case should be applied for at Special Term; and that the power to grant it is not with the referee. Whenever such an amendment becomes necessary, he may suspend the trial, or grant an adjournment and allow the application to be made at Special Term, for leave to amend.

The decision of a referee is reviewable upon motion, as well as upon appeal. (7 How. Pr., 294. 11 id., 170.

Chittenango Cotton Co. v. Stewart.

19 *id.*, 267. 22 *id.*, 481. 22 *Barb.*, 161. 53 *id.*, 525, 570. 3 *Rob.*, 669. 9 *Bosw.*, 163; *S. C.*, 3 *Keyes*, 525. 2 *Daly*, 203. 23 *N. Y.*, 357. 14 *id.*, 527. *Billings v. Baker*, 6 *Ab.*, 213. 3 *Ab.*, *N.S.*, 359.)

The court may exercise the power to strike out parties, under section 173 of the Code, and it has been exercised. (*Turner v. Hillerline*, 14 *How.*, 231.) In that case, after the amendment was allowed, I, as counsel for the defendant, continued the trial before the same referee, the learned judge who decided the motion having refused to appoint a new referee, as no sufficient cause was shown therefor.

It follows that so much of the defendants' motion as seeks to set aside the reference, because of the change of parties by death and removal, must be denied, and the amendment allowed must be declared to be in excess of the power of the referee. And the plaintiff may apply to the court for leave to have such amendment stand in force; and the right of the defendants to have the reference vacated, if such amendment shall be allowed, shall not be prejudiced by this motion.

The defendants' motion, to the extent above indicated, is granted, with \$10 costs.

[ONEIDA SPECIAL TERM, October, 1878. *Hardin*, Justice.]

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In the matter of the application of the New York
CENTRAL & C. RAILROAD COMPANY, to acquire lands
of CHESTER JOHNSON.

AND THREE OTHER CASES.

Where it satisfactorily appears, upon an application by a railroad company for leave to acquire additional lands, 1. That the parties have not been able to agree upon the price of the land sought; and 2. That the lands are required by the company for the purposes of its incorporation, and to enable it to suitably build embankments, and provide suitable drainage, and to keep its road in proper condition to accomplish the purposes of its incorporation, effect should be given to the general railroad act of 1850, and the amendment of 1869, relative to the acquisition of additional lands by railroad companies, when necessary; and the petitioner be allowed to take an order appointing commissioners of appraisal.

Section 28 of the general railroad act of 1850, authorizing companies formed under that act to lay out their roads "not exceeding six rods in width," relates to the first laying out, and the first construction, of a railroad; and must be read in connection with § 21 of the same act, with the amendment of 1869 (chap. 287) added thereto; which amendment permits lands to be subsequently taken by a company, in addition to what it was originally entitled to acquire, when laying out its road, if such additional lands shall be required for the purposes of the incorporation.

It cannot be said that the "purposes of its incorporation" are accomplished when a road is constructed, and in operation, with two tracks. The company is bound, by express enactment, to furnish to passengers and freighters the means of transferring passengers and freight in accordance with the statutory requirement.

This duty has been cast upon the company, and to accomplish it, the road must keep up with the growing demands for further facilities.

The statute authorizes a road, coming within its terms, to acquire such lands as are necessary to its operation, though when acquired and added to those already owned, the road would be more than six rods in width.

The act must be so construed as to give effect to its provisions, and so as not to defeat the object of the legislature.

THIS application is made upon a petition verified by one of the directors of the railroad company, and a notice of motion, &c.

The contestant appeared, and was allowed to file a denial of the allegations of the petition, and to give evidence to disprove the allegations stated in the petition. The railroad company also put in some evidence

in reply to the contestant's proof; and admissions were made showing that the business of the company has increased largely in the last five years, and that the tons of freight carried in 1870 were over 769 millions, in 1871 over 888 millions, and in 1872 over 1,020 millions; and the oral evidence also indicates that the business of the road has been upon the increase; that additional tracks have been laid upon some parts of its line; and that embankments for new tracks have been constructed either way from Johnson's lands, and it appears that the road is about completing two additional tracks along its line from Utica to Syracuse, and from Albany to Buffalo.

Johnson & Prescott, for the railroad company.

Scott Lord, for the contestants.

HARDIN, J. The petition in this case is verified in the language commonly in use in this court.

Certain facts are alleged to be upon information or belief, and the source of the information is pointed out, and the allegations, taken in connection with the proof given upon the hearing, must be held sufficient, *prima facie*, to establish the allegations needed to authorize the application.

The contestant was allowed to disprove any of the allegations of the petition.

Upon all the proofs before the court, the conclusions are reached,

1. That the parties have not been able to agree upon the price of the lands sought.

2. That the lands are required by the company for the purposes of its incorporation, and to enable it to suitably build embankments, and provide suitable drainage, and to keep its road in proper condition to accomplish the purposes of its incorporation.

Matter of the New York Central &c. R. R. Co.

The learned counsel for the contestant urges upon the attention of the court, the provision of section 28 of the general railroad act of 1850. That section declares that "every corporation formed under the act" * * * "shall have power to lay out its road not exceeding six rods in width, and to construct the same." * * * That provision evidently relates to the first laying out, and the first construction of a railroad. But it must be read in connection with section 21 of the same act as it now stands, with the amendment of 1869 (chap. 237) added thereto. It is provided "if, at any time after the construction of any railroad," * * * "such road shall require, for the purposes of its incorporation, or for the purpose of running or operating any railroad so owned or leased by such company, ANY real estate in ADDITION to what it has already acquired," * * * "such company may acquire such additional real estate." Here is a provision which permits lands to be taken in addition to what a company was originally entitled to acquire when laying out its road. It appears by the evidence that the road owns six rods in width at the point in dispute, and can build its additional tracks upon its lands, and that the slope of the embankment will descend upon the lands of Johnson; and this statute seems to provide for such cases—to permit the acquisition of "such additional real estate"—for the purposes of its incorporation.

Having laid the road, originally, six rods wide, the additional power, or power to acquire *additional lands*, is given by the amendment of 1869.

But it is said that the purposes of its incorporation are accomplished—that a railroad is in operation with two tracks from Utica to Syracuse, and that the purposes of the incorporation of the railroad company are fully answered.

The company is bound, by express enactment, to furnish to passengers and freighters the means of trans-

Matter of the New York Central &c. R. R. Co.

ferring passengers and freight in accordance with the statutory enactment.

This duty has been cast upon the company, and to accomplish it the road must keep up with the growing demands for further facilities. In the language of DENIO, J., "the company must not be in fault in providing *sufficient accommodation* for the general traffic of their road under ordinary circumstances." (*Wibert v. N. Y. & Erie R. R. Co.*, 2 *Kernan*, 250.) To furnish "sufficient accommodation for the general traffic of the road," its general business may be said to be the "purpose of its incorporation." And to meet the increasing demand upon the road, — to fulfil "the purposes of its incorporation" — the act of 1869 declares it shall have power to acquire *additional* lands. So, too, that act provides that it shall have power to acquire lands "which may hereafter be rendered necessary for any *structures* in use, or for any other purpose necessary to the operation of such railroad."

The statute is very broad and comprehensive in its terms, and seems to authorize a road coming within its terms to acquire such lands as are necessary to its operation, though when acquired and added to those theretofore owned, the road would have more than six rods in width.

The act must be so construed as to give effect to its provisions, and so as not to defeat the object of the legislature. (*Matter of New York & Harlem R. R. Co. v. Kip*, 46 *N. Y.*, 546.) ALLEN, J., in the case cited, says of the act of 1869, that "the language of the act is very general and comprehensive. If lands are required for any of the purposes of the incorporation * * * they may be taken *in invitum*." And at page 553 of the same case, he adds: "The legislature has committed to the discretion of the corporation the selection of lands for its uses, and if the necessity of lands for such purposes is shown, and the lands sought are

Tammien v. Clause.

suitable, *the courts* cannot control the exercise of the discretion, or direct which of several plots of ground shall be taken."

Nothing appeared upon the hearing of this case, to lead the court to conclude that the necessities of this road, and its duty to keep up with the increased demands made upon it by the public in respect to suitable accommodations for passengers and freight, do not render it necessary for the road to acquire the lands described in the petition. The statute of 1869 must therefore have effect given to it, and the petitioner be allowed to take an order appointing commissioners.

Orders may be entered, upon serving a copy of this opinion, appointing B. J. Beach, Geo. Williams and Luther Guiteau as commissioners.

Ordered accordingly.

[ONEIDA SPECIAL TERM, October, 1878. *Hardin*, Justice.]

TAMMIEN vs. CLAUSE.

Part payment, by a debtor, of a demand, does not form a sufficient consideration for an agreement by the creditor to extend the time of payment of the balance of the demand.

But where an agreement to extend the time of payment is based upon the agreement of the debtor, to do, and the doing by him, of an act which he was not in law under obligation to do — as to procure and assign a policy of insurance to the creditor — it is upon a sufficient consideration ; it *seems*.

It is the general rule, and well settled practice, to deny an injunction when the general equities of the complaint are denied. But it is the duty of the court, whenever relief of a temporary or permanent character is refused, otherwise than upon a full consideration of the merits, to make such refusal without prejudice to a new suit or application.

Upon the hearing of a motion, the court may direct a reference to a referee, to ascertain and report the facts in respect to the existence of an agreement which is alleged in the complaint and denied in the answer, with his opinion thereon.

MOTION to continue injunction. A preliminary injunction was allowed *ex parte*, and the defendant ordered to show cause why it should not be continued. The hearing, on the day for showing cause, was upon the pleadings only. The plaintiff offered to read further affidavits in support of his complaint. To that the defendant objected.

H. C. Hall, for the plaintiff.

C. G. Burrows, for the defendant.

HARDIN, J. By answering the complaint, the defendant has taken issue upon the merits of the plaintiff's alleged case. A demurrer would have raised and compelled a decision, at the very outset of the case, of the very interesting question of law raised upon the hearing of this motion, in respect to the validity of the alleged agreement to extend the time of payment of the mortgage referred to in the pleadings. That question involves the merits, and will control, to a very great extent, any decree that may be ultimately made in this action.

The learned counsel for the defendant insists that the case of *Parmelee v. Thompson* (45 N. Y., 58,) is decisive of this question. But in that case there was a payment of costs—a performance of an obligation, by the defendant—of a legal obligation absolutely resting upon him. He had made, in effect, a part payment of the liability resting upon him. It has long been settled that such a partial payment does not form a sufficient consideration for an agreement to extend the time of payment of the balance of the creditor's demand. That was the only point involved in and actually decided in the above case. Judge ALLEN refers, in his opinion, to *Gibson v. Renne*, (19 Wend. 389.) In that case it was held, by the court, that a *part payment* in the note of a third person forms no consideration for an agreement to

Tammien v. Clause.

extend the time for payment of the balance. That payment in the *obligation* of a third party is upon the same footing with a payment made in money: see opinion of BRONSON, J. (*Id.* 390.)

In this case the alleged agreement was based, as is stated in the complaint, upon the agreement by the defendant to do, and the doing by him of an act which he was not, in law, under obligation to do. The plaintiff had in no way covenanted to procure and assign a policy of insurance to the defendant.

If such an obligation rested upon the plaintiff, and he performed it by an assignment of a policy, or, what is equivalent, by making the loss, if any, payable to the defendant, there would, in that act, have been no consideration for an agreement by the defendant to extend the time of payment.

It has been said that promising additional security is a sufficient consideration for an agreement, made by the creditor, to extend the time of payment. (2 *Wend.*, 201. 15 *Barb.*, 332. *Cowen's Tr.*, p. 68, 4th ed, sec. 118. 30 *N. Y.*, 474. 36 *id.*, 107, 110.) But it is not necessary to determine, upon this preliminary injunction, whether that rule has been modified, or not. That question belongs to a more serious consideration of the case upon the merits, from a decision of which an appeal might be had.

Upon this motion, the question might not be reviewable, and it is not in accordance with the better practice of the court to determine the merits of the case upon a motion for a preliminary injunction.

The learned counsel for the defendant correctly states it to be the general rule, and well settled practice, to deny an injunction when the general equities of the complaint are denied. The authorities fully bear out his proposition. (1 *John. Ch.*, 211. 6 *Paige*, 295. 18 *How. Pr.*, 186. 42 *id.*, 52. 3 *Daly*, 165.) But it is likewise the duty of the court, whenever relief of a temporary or

permanent character is refused, otherwise than upon a full consideration of the merits, to do so without prejudice to a new suit or application. The extent of the refusal, or the time when it shall be made, rests, somewhat, in the discretion of the court or judge having the case or motion under consideration. (*Crosier v. Acer*, 7 Paige, 137. Code, § 219.)

In this case the plaintiff, in effect, asked leave to present further affidavits; and if this application to continue the injunction should be denied, then it would be his right to ask, on fresh affidavits, as well as on the complaint now here, for a renewal, or a new order for an injunction. (60 Barb., 162.) And that might not advantage the defendant, any more than a conditional order which can be made on this motion. Evidently when both persons shall have an opportunity to present full affidavits, there will be a serious conflict whether any agreement to extend the time of payment was actually made, or not, between the parties, as alleged in the complaint, and fully denied in the answer of the defendant.

That question can be more intelligently and correctly determined by a person who shall hear an oral examination of the parties and their witnesses, than by the court or a judge upon hearing such conflicting affidavits.

It is therefore believed that it is better that a referee should be ordered, upon this motion, to ascertain and report the facts in respect to the alleged agreement, to wit: Was any such agreement made, as is alleged in the complaint, to extend the time of payment? and, What is the value of the premises covered by the mortgage?

Upon the return of the report of the referee on those questions, as well as any evidence he may take in respect thereto, with his opinion thereon, the determination of this motion will be made.

The reference may be to Hon. A. Loomis, in accordance with the views here expressed, upon the settlement

Camp *v.* Gifford.

of an order before me, on two days' notice, to be given by either party.

The referee's fees must be paid by the plaintiff; and they will be costs in the cause.

After the settlement of the order of reference, the referee will be at liberty to proceed to a hearing, on three days' notice, to be given by either party.

Further questions, as to costs, reserved until the final hearing of the motion.

Ordered accordingly.

[AT CHAMBERS, Little Falls, March, 1878. *Hardin*, Justice.]

HERMAN CAMP *vs.* CHARLES C. GIFFORD AND CHARLES H. GIFFORD.

As between the original parties to a sale and conveyance of land, where the consideration is money to be paid, and the whole or any part of the same remains unpaid, then the presumption is that a *lien* for the unpaid purchase-money exists, in favor of the vendor; and it is incumbent on those denying its existence to prove that the vendor has relinquished such lien.

But when the vendee, in consideration of the conveyance to him of the land, has undertaken to do and perform a collateral thing specified, such promise is regarded as payment of the price of the land, and there is no lien.

Whether or not, in such a case, the vendor can have or demand money, from the vendee, is uncertain and dependent upon a contingency which may never happen; and if it shall, it is uncertain when, or in what amount. The right to demand money can only arise upon non-performance of the agreement of the vendee to do the particular thing promised.

Upon the execution and delivery of a deed from the plaintiff to C., his daughter, the latter, as a consideration for the making and delivery thereof, promised and agreed, to and with the plaintiff that she would clothe, care for, support and maintain R., the plaintiff's wife, during the remainder of her natural life. The deed expressed a money consideration, but none was in fact paid, or agreed to be paid. It appearing that the grantee had fully performed her promise; *held* that, in the absence of any allegation or claim that she had failed to perform, the plaintiff could not maintain a suit in equity to establish a *lien* upon the land conveyed, for the purchase-money.

THIS is an action in equity, and was tried by the court, without a jury.

The following facts were found by the court :

1st. That Abner W. Camp, late of the town of Dunkirk, died the owner in fee simple of the lands and premises described in the complaint. That he left a last will and testament, which has been duly admitted to probate, by and before the surrogate of Chautauqua county. That in and by such last will and testament, he devised the use of all his property, including such premises, to the plaintiff, a brother of the testator, for and during his natural life, and the remainder over to Catharine Camp, the daughter of the plaintiff. That at the time of the death of said Abner W. Camp, the said Catharine was unmarried, and was a member of the plaintiff's family, and was provided for by him.

2d. That on the 7th day of January, 1866, Roxanna Camp was the wife of the plaintiff, and a lunatic ; that the plaintiff lived on said premises ; and the said Roxanna his wife, and the said Catharine his daughter, lived on said premises, as members of the plaintiff's family, both of them supported and maintained by him.

3d. That on the day last named, the plaintiff, by deed containing no covenants, expressing on its face a consideration of \$500, and therein acknowledged to be received and paid, released and conveyed to his daughter Catharine all his interest and estate of, in and to said premises. That in fact the said \$500 was not paid, and was never agreed to be paid, by said grantee. That at the time of receiving the said deed, and as a consideration for the making and delivering of the same by the plaintiff, the said Catharine promised and agreed to and with the plaintiff, by parol, and not in writing, that she would clothe, care for, support and maintain the said Roxanna Camp during the remainder of her natural life ; but such contract contained no provision as to the place where such support should be given. But it was

Camp v. Gifford.

understood and agreed that it should be in the family, and under the supervision of the said Catharine. That at that time it was contemplated that the said Catharine would very soon thereafter intermarry with the defendant Charles C. Gifford; and they did, within a few days thereafter, in fact intermarry.

4th. That the said Catharine died intestate in March, 1868, leaving her surviving, the defendant Chas. C. Gifford, her husband, and the defendant Chas. H. Gifford, her son and only heir at law.

That during her lifetime, the said Catharine, after her marriage, lived and resided on said premises, and in all respects, as provided in and by her agreement, clothed, cared and provided for, and maintained the said Roxanna in her family, on said premises. That the said Catharine died the owner of said premises, never having, in anywise, incumbered the same.

That after the death of said Catharine, and up to a short time prior to the commencement of this suit, the defendant Charles C. Gifford supported and maintained the said Roxanna, and since that time the plaintiff has provided the means for her support.

That, as matter of fact, the defendant Charles C. Gifford is the administrator of the estate of the said Catharine; but out of what moneys, or in what capacity, he has provided for the support of said Roxanna does not appear from the evidence.

That it does appear that the plaintiff, in virtue of his marital relations with the said Roxanna, is under a legal obligation to provide for her support and maintenance.

5th. That in and by the last will and testament of the said Abner W. Camp, deceased, he appointed the plaintiff sole executor of such will; and the latter took out letters testamentary, and entered upon the discharge of his duties as executor. That in the autumn of 1870, many questions arose and controversies existed between

Camp v. Gifford.

the plaintiff as executor and in his own right, on the one side, and the defendant Charles C. Gifford as administrator, and the defendant Charles H. Gifford, on the other, as to their respective rights and interests in the estate of the said Abner W. Camp, and as to the extent of such estate, and the amount of assets in the hands of the plaintiff as executor, unaccounted for, and as to the state of his accounts, and whether or not there was a deficiency of assets to pay the debts and obligations of the said testator, and whether or not, to meet such deficiency, a resort would have to be made to the premises described in the complaint. That proceedings were then pending in the surrogate's court, in and for the county of Chautauqua, for the final settlement of the accounts of the said executor; and to oppose such accounting, and to protect their own rights and interests, both of the defendants had appeared, Charles C. Gifford as administrator, &c., and Charles H. Gifford by his guardian *ad litem*. That all controversies of the nature and character above stated were compromised and settled.

That at the same time, negotiations were had between the plaintiff in his own interest and in his individual capacity, and the defendant Charles C. Gifford, of and concerning the support and maintenance of the said Roxanna; and the instrument in writing dated December 22, 1870, and signed and sealed by the defendant Charles C. Gifford, contains the terms of such agreement, and was delivered to the plaintiff as a complete and executed agreement, and he took the same into his possession and keeping, and produced the same on the trial of this action, upon the call of the defendants.

6th. That the plaintiff has never prosecuted any action against the defendant, as such administrator, for the non-performance of the agreement of the said Catharine, deceased, to provide for, support and maintain the said

Camp v. Gifford.

Roxanna ; nor any action against the said Gifford individually, for the non-performance of that agreement.

Mr. *Morris*, for the plaintiff.

Mr. *Holt*, for the defendant C. C. Gifford.

Mr. *Edwards*, for the defendant C. H. Gifford.

BARKER, J. The fundamental legal proposition presented upon the foregoing facts is—did the plaintiff have and retain a lien, in equity, upon the premises conveyed by him to his daughter, as a security for the performance of her promise to support and maintain her mother, the wife of the plaintiff, during her natural life? The only consideration for the deed was such promise. No money consideration was stipulated for, by the terms of the bargain and sale.

The plaintiff's whole case rests upon the truth of this proposition. If the same cannot be affirmed as being the law in this state, then he has failed to show a case for the relief sought.

The English chancery doctrine of the vendor's equity lien for unpaid purchase-money, when he has made an absolute conveyance of the land, has been adopted in this state and in some of the other states, with qualifications and modifications. In some of the states the rule has been wholly repudiated and condemned, and has no existence in their equity courts.

As between the original parties, where the consideration for the sale was money to be paid, and the whole or any part of the same remains unpaid, then the presumption is, the lien exists, and it is incumbent on those who deny the existence of the lien to prove that the vendor has relinquished it. (4 *Kent's Com.*, 152. *Garson v. Green*, 1 *John. Ch.*, 308. *Story's Equity*, §§ 1217 to 1228. *Fish v. Howland*, 1 *Paige*, 20.)

Camp v. Gifford.

In many other cases the doctrine is upheld and applied.

Does the case made by the plaintiff come within the rule thus established? I think it does not; and it is so held by every English and American case on that subject reported, and by the leading elementary writers of both countries.

It is worthy of note that the elementary writers, Kent, Story and Sugden, while writing upon this topic, use the phrase, "*unpaid purchase-money*," in its most literal sense and meaning — as applicable to cases where the vendee has promised to pay the consideration in money.

Where the vendee has undertaken to do and perform a collateral thing in consideration of the conveyance of the land to him, such promise is regarded as payment of the price of the land, and there is no lien. Whether or not, in such a case, the vendor can have or demand money from the vendee is uncertain and contingent, and may never happen, and if it shall, it is uncertain when, or in what amount. The right to demand money can only arise upon non-performance of the agreement of the vendee to do a particular thing. Chancellor Kent, in his Commentaries, says the lien is not reserved, where the object of the sale was not money, but some collateral benefit. (*See supra.*)

Story says, the lien ceases, by the Roman law, where anything is taken in satisfaction of the price, although the payment had not been positively made. (*See* § 1223.)

In *Mackreth v. Symmons*, (15 Vesey, 329,) an important and leading English case, on this subject, Lord Eldon holds that if the vendor has taken the promise of the vendee to do more than to pay money, the lien is relinquished.

In *Coit v. Fougere*, (36 Barb., 195,) the court, in its opinion, states and affirms propositions similar to those contained in the foregoing authorities.

Camp v. Gifford.

In *Hare v. Van Duesen*, (32 Barb., 92,) the question up and discussed was, when the lien was waived. The learned judge stated two classes of cases, where it would not continue. One, where the parties have agreed to substitute something else for the unpaid purchase-money — as the covenant or obligation of the vendee to do some collateral act. And also where, at the time of the conveyance, the transaction is so far complete that no present debt or obligation is owing by the vendee to the vendor.

I concur in both of these propositions, as being the result of the adjudications in this and the other states where the general rule prevails.

The editors of, and commentators upon, *Leading Cases in Equity*, have given these questions much consideration, and fully sustain the rule which I follow in disposing of this case. (*Lead. Cases in Eq.*, vol. 6, p. 248. See also *McKillip v. McKillip*, 8 Barb., 552.)

In *Brawley v. Catron*, (8 Leigh, 522,) it was held in Virginia, that the lien would not be sustained as a security for unliquidated and uncertain damages, and does not exist in a case where the consideration for the conveyance of the land is an engagement by the vendee to support the vendor during life.

The daughter of the plaintiff did not agree to pay money to him for the deed. Her sole promise was to support her mother. It was to do a certain thing as the sole consideration for the conveyance. It would be most unreasonable to say, with such an agreement on her part, that the parties intended that the vendor should have a lien on the land; that she did not acquire all the vendor's interest in the land; and that she could not convey a full and complete title to a purchaser, so long as her mother lived, although she should fully perform, day by day, her promise to provide for her. The transaction was a mere family arrangement, being wholly devoid of those elements essential to up-

 Chase v. Miser.

hold a lien, in the nature of a mortgage, which can be enforced by proceedings *in rem*.

Having reached this conclusion, I shall not consider any of the other propositions presented by the defendants, in avoidance of the plaintiff's right to the relief asked for. I put my adjudication upon the single legal proposition stated and considered.

I have intended to pass upon every question of fact raised by the evidence, except the one, whether Camp specifically relinquished, at the time of the settlement, any lien he might have on the house and lot. That, I deem wholly unnecessary to pass upon, after holding that there never was a lien.

The plaintiff's complaint is dismissed, upon the merits, with costs.

Complaint dismissed.

[CHAUTAUQUA SPECIAL TERM, January, 1874. Barker, Justice.]

 CHASE vs. MISER.

When, upon appeal to the General Term, a judgment of a county court is reversed, and a new trial ordered, "without costs on the appeal to either party," the clerk has no power or authority to tax the costs of appeal and enter the same in the judgment of reversal.

If it appears, in such a case, that in the county court affidavits tending to show that injustice was done to the defendant, by the judgment of the justice, were read and passed upon; and that the court refused a new trial in the exercise of its discretion, the General Term, on appeal from the county court, has no power to award a new trial.

But if the county court omitted to pass upon the affidavits, on the ground that it had no power, then the General Term may, on appeal, reverse such holding. Where it does not appear that the county court did act, one way or the other, upon the affidavits, the question as to the power of the General Term to make an order granting a new trial "without costs of the appeal to either party" cannot properly be passed upon on a motion to compel the clerk to tax the defendant's costs of appeal, and enter the same in the judgment. nl

Chase v. Miser.

MOTION by the defendant to compel the clerk to tax defendant's costs of appeal from the county court to General Term, and from a justice's court to the county court of Jefferson county.

The plaintiff recovered, before a justice of the peace of Jefferson county, a judgment for \$23, damages and costs. The defendant appealed to the county court, on questions of law only, and also asked for a new trial on the ground that it was taken by default, and that manifest injustice was done to the defendant by the judgment. Affidavits tending to excuse the default, and to show that injustice was done to the defendant by the judgment, were read in the county court. The judgment was affirmed by the county court, and the defendant appealed to the General Term of this court, and an order was made reversing the county court judgment, and the justice's judgment, and ordering a new trial before the same or another justice, "without costs on the appeal to either party."

The defendant thereupon made out a bill of costs, and asked the clerk to tax and enter the same in the judgment of reversal. The clerk refused, and this motion is to compel such taxation and award of costs to the defendant.

The papers used on this motion do not show that the county judge passed upon the affidavits excusing the default and showing manifest injustice; nor do the papers used before the General Term show it.

D. O. Brien, for the motion.

Chas. D. Wright, opposed.

HARDIN, J. It has been repeatedly held that the clerk has no power of a judicial nature which he can exercise, and award costs to either party. His duties are ministerial, and he must obey the orders and directions given by the courts.

Chase v. Miser.

It was held in *Chapin v. Churchill*, (12 How., 367,) that when a judgment was reversed "*without costs to either party*," the clerk had no power nor authority to enter the judgment of reversal "*with costs*." And it was there held "he should follow the decision of the court."

Since the decision of that case, it was held in *Hees v. Nellis*, (1 Thomp. & C., 118,) that where a party was clearly entitled to costs, a judgment entered for costs would not be reversed and set aside, though the established practice would require the party to apply on motion, for costs. This last case is consistent with *Gray v. Hannah*, (3 Abb., N.S., 183.)

It is here insisted, by the learned counsel for the defendant, that the General Term had no power to award a new trial. If the papers indicated that the county court passed upon the affidavits, and refused a new trial in *the exercise of its discretion*, the position would be upheld by *Wavel v. Niles*, (24 N. Y., 635.) If, however, the county judge omitted to pass upon the affidavits upon the ground that he had no power, then the General Term might reverse such holding. SMITH, J., in the case last cited, says: "If in this case the county court had held that it had no power to hear and decide the question of error in fact upon affidavits, it would have been proper for the Supreme Court to have reversed such decision and remitted the case to the county court for the correction of such error." (See also 29 N. Y., 420; 45 *id.*, 499; 63 Barb., 553, *as to review of discretion*.) It does not appear by the papers here that the county court did act, one way or the other, upon the affidavits. The question, therefore, cannot now properly be passed upon, as to the power of the General Term to make the order which it made in this case. That question will more appropriately be considered when the defendant shall move to set aside that part of the decision which withholds costs from the

Cooter v. Bronson.

defendant ; or when he shall apply to the General Term to modify its order.

This motion, according to the rule laid down in *Chapin v. Churchill*, (*supra*,) must be denied, with \$10 costs.

Order accordingly.

[JEFFERSON SPECIAL TERM, April, 1875. *Hardin*, Justice.]

CHARLES L. COOTER vs. BRONSON and FRITS.

A warrant issued by a justice of the peace, commanding the arrest of "*Myron Cooter*," on a criminal charge, affords no justification to the officer for the arrest and detention of *Charles L. Cooter*; especially where the evidence tends to show that the felony charged therein was committed by *Myron*, and not by *Charles L.*; and that there was no ground of suspicion against the latter.

Process for the arrest of a person must so describe him that the officer may know, and that the party whose liberty is threatened may know, whether he is bound to submit.

MOTION by the defendants for a new trial, on the minutes.

Luddington & De Camp, for the plaintiff.

S. C. Huntington, for the defendants.

HARDIN, J. It appeared, upon the trial of this action, that the defendants sought to justify the arrest and imprisonment of the plaintiff upon a warrant commanding the arrest of one *Myron Cooter*. The court held that the arrest of the plaintiff, and detention of him for two and a half days, upon a warrant, was not justified by the production of a warrant commanding the arrest of *Myron Cooter*.

The evidence also showed that the complainant and constable were notified, at the time of the arrest, that the plaintiff was innocent; that his name was Charles; and that he had a brother who was named Myron. The complainant's son, and the constable, having left the plaintiff under arrest, and in the county of Oswego, went to the city of Syracuse and had the warrant indorsed, and then arrested Myron and compounded the felony with him, and then returned to the place where the plaintiff was held under arrest, and caused him to be discharged.

The court held that the production of the warrant commanding the arrest of Myron furnished no justification of the acts complained of by the plaintiff. The evidence tended to show that Myron had committed the felony charged in the warrant, and that the plaintiff was totally innocent thereof.

The ruling is sustained by the cases decided and reported in this district. (*Miller v. Foley*, 28 Barb., 630. *Farnham v. Hildreth*, 32 id., 277. *Abeel v. Conhyser*, 42 How., 252.)

Process for the arrest of a person must so describe him that the officer may know, and that the party whose liberty is threatened may know, whether he is bound to submit. (6 Cowen, 456; S. C., 1 Wend., 126. 4 id., 555.)

This was not a case of an attempt to justify without a warrant. There was no proof that the plaintiff had committed a felony. The attempt was to justify the arrest of the plaintiff upon a warrant commanding the arrest of his brother, Myron Cooter; and the jury having found that the plaintiff was not the person charged in the warrant, their verdict must be allowed to stand.

There was no reasonable ground shown to suspect Charles, the plaintiff, of the commission of the alleged felony. (40 N. Y., 463.) Indeed the defendants proceeded upon the ground that Myron was the offender,

 Miller v. Shall.

and they finally acquiesced in an alleged settlement with him, and cannot now escape the consequences of their unlawful arrest of Charles, the plaintiff.

If this arrest had been without any warrant, and proof given of the commission of a felony, and that the arrest was made in good faith, with reasonable ground to believe the plaintiff the guilty party, the constable would have been justified completely, upon a finding of those facts by the jury. But this was an attempt to justify an arrest of the plaintiff upon a warrant against his brother, Myron, and the keeping of the plaintiff in custody, while a further arrest was being made, of Myron, and a settlement made with him. It differs from the cases cited by the learned counsel for the defendants. (*See 54 Barb.*, 490; *Carpenter v. Mills*, 29 *How.*, 473; *Stewart v. Hawley*, 21 *Wend.*, 552; 1 *Hilliard on Torts*, 220, &c.)

The damages found by the jury are not excessive; and the motion for a new trial is denied.

[OSWEGO CIRCUIT AND SPECIAL TERM, May, 1875. *Hardin*, Justice.]

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MILLER vs. SHALL.

Service of a notice of judgment, to limit the time for appealing, is complete when it is mailed to the attorneys of the other party, properly addressed, &c.; whether it is received by such attorneys or not.

An order and notice of substitution are both essential, to render a change of attorneys regular. Notice alone, without an order actually obtained, is insufficient.

And unless an order for substitution is obtained, and notice thereof served upon the opposite attorney, he is not bound to recognize the person claiming to be substituted, and may disregard and return notices received from him.

MOTION, by the plaintiff, for leave to make a case and bill of exceptions, and to have the plaintiff's attempt to appeal declared good and effectual, and that the appeal was taken in time.

Miller v. Shall.

The action was tried in November, 1872, and leave given to make case, &c., in thirty-five days. No case was made within the time given by the order. Judgment was perfected in favor of the defendant, and notice thereof given January 6th, 1874, by serving notice upon Culver & Burchard, attorneys of the plaintiff, and upon S. S. Morgan, Esq., who had appeared as counsel for the plaintiff. The attorneys say, in their affidavits, they never received the notice of judgment.

A notice of appeal was served by Morgan & Rafter, as attorneys for plaintiff, July 15, 1874. The same was returned with a notice that no notice of substitution as attorneys had been given. On Nov. 10, 1874, Morgan & Rafter served another notice of appeal, which was returned, with notice that the time to appeal had expired.

Morgan & Rafter, for the motion.

A. H. Prescott, opposed.

HARDIN, J. It was held in *Humphrey v. Chamberlain* (11 N. Y., 274,) that "the Supreme Court has not power to relieve a party from an omission to appeal to the General Term from a judgment within the time prescribed by law."

The notice of judgment served January 6, 1873, had the effect to limit the plaintiff's right to appeal, whether it was received by her attorneys or not. The service was complete when the notice was mailed properly addressed, &c. (*Morris v. Morange*, 17 Abb., 86; *affirmed by Court of Appeals*, see 31 How., 639.)

The 15th rule of this court provides that an attorney may be changed by the order of the court or a judge thereof, not otherwise. No such order was obtained prior to the service of notice of appeal by Morgan & Rafter, and the return thereof in July, 1873, and so far as the defendant was concerned he was right in return-

Miller v. Shall.

ing the notice of appeal, and treating Culver & Burchard as the plaintiff's attorneys of record. (*Parker v. City of Williamsburgh*, 13 How., 250.) An order, and notice of substitution, are essential to render the change of attorneys regular. BROWN, J., says, in the case last cited, (page 251,) that "without notice, he could not safely serve his papers upon the substituted attorney, and treat him as the real representative of the party."

There must be notice of substitution given, to render it effectual. (*Bogardus v. Richtmeyer*, 3 Abb., 179.)

The plaintiff's learned counsel claimed on the argument of the motion, that the appeal might be regarded as a new action, and therefore that it might be brought by other attorneys than those appearing on the record prior to judgment. No case was cited supporting the argument. None has been found by the court, holding to the extent of the argument. But on the contrary, HOFFMAN, J., rules the other way in *Fry v. Bennett*, (7 Abb., 365.) He says: "It has been urged that an appeal is a new action. With respect, I regard this position as *clearly indefensible*."

These views lead to the conclusion that no appeal was regularly taken before the expiration of the time limited by the statute within which an appeal may be brought.

There can be no benefit derived by the plaintiff in having a case and exceptions, in the absence of an appeal. The laches of the plaintiff have been very great.

The motion must be denied, with \$10 costs.

[HERKIMER SPECIAL TERM, June, 1875. *Hardin*, Justice.]

MARIA P. BOSTWICK *vs.* THE DRY GOODS BANK.

Though immaterial allegations be inserted in a complaint, that is not a cause of demurrer; and they cannot be stricken out on a motion for judgment for frivolousness of demurrer.

Redundant or impertinent matter, inserted in a complaint, do not furnish sufficient ground for a demurrer.

A complaint stated, in effect, that the plaintiff, being the owner of a certain United States bond, left it with B. & H., as her agents, to convert the same into cash for her; that B. & H. employed the defendant to accomplish that object; that the defendant sold such bond, or converted it into money, and instead of remitting the proceeds to the plaintiff, or her agents, B. & H., converted the same to its own use, by placing the same to the credit of B. & H. on their account: *Held*, on demurrer, that the complaint contained a good cause of action.

Held, also, that such diversion of the bond, or its proceeds, to the purpose of a security, or application upon B. & H.'s antecedent debt to the defendant, without the consent or authority of the plaintiff, or any fresh advances made thereon, did not constitute the defendant a holder in good faith and for value, as against the plaintiff.

Held, further, that even a person to whom B. & H. had, under such circumstances, voluntarily delivered the bond, upon an antecedent debt of theirs, could not hold it, as against the true owner.

MOTION by the plaintiff for judgment, for frivolousness of demurrer to complaint.

A. & S. Loomis, for the motion.

Wm. Sharp, opposed.

HARDIN, J. The plaintiff, by her complaint, seeks to recover of the defendant money equivalent to the value of a United States bond which she left with Bush & Hely, to be sent to New York and sold, and which was by them, as her agents, sent to the defendant and sold, and the value, \$585, received by it, but not paid over to Bush & Hely, nor transmitted to them for the plaintiff, and not transmitted to the plaintiff, but kept by the defendant.

The demurrer is on the general ground that the com-

Bostwick v. Dry Goods Bank.

plaint does not contain facts sufficient to constitute a cause of action.

The learned counsel for the defendant insisted, on the argument, that immaterial allegations are found in the complaint. Assuming that he is right, that is not a cause for demurrer; and they cannot be stricken out, upon this motion. Redundant or impertinent matter, inserted in a complaint, do not furnish sufficient ground for a demurrer.

It was said in *People v. Mayor &c. of New York*, (17 *How. Pr.*, 56,) that "under the Code, the plaintiff may present, in his complaint, a mass of heterogeneous facts, and a volume of unmeaning words, and any number of prayers for the most various and inconsistent relief, and none of these defects can be reached by demurrer, provided the complaint contains, no matter in what state of disorganization, the elementary constituents of a good cause of action." (See opinion of SUTHERLAND, J., p. 62; 1 *Duer*, 242; 11 *How.*, 218.)

The complaint in this case states, in clear terms, that the plaintiff was the owner of the United States bond, and that the plaintiff "caused to be left with Bush & Hely," the bond "to be by them as *agents* or *bailees for her*, sent to New York and sold and converted into money for her;" and it then alleges that the defendant was the correspondent of Bush & Hely; that the defendant received said bond from B. & H. for collection, about the 9th of November, 1875, and immediately sold it, or converted it into money, and instead of remitting the sum it got for it to the plaintiff or her agents, Bush & Healy, the defendant "converted the same to its own use by giving said Bush and Hely credit therefor *on their account*." It thus appears that the plaintiff was the owner of the bond; that she left it with Bush & Hely as her agents, to convert into cash for her; that they undertook such agency; that in complying with the plaintiff's request and authority, they employed the

defendant ; that the defendant had the property of the plaintiff, or its proceeds, and has not paid, lent or advanced anything upon it, or for the plaintiff, or at her request ; and that the defendant "gave Bush & Hely credit therefor on their account."

There is nothing to show a fresh advance to Bush & Hely for the bond or its proceeds, and no consent or authority from the plaintiff is shown, to justify the application of it or its proceeds upon the account of Bush & Hely.

The allegation of the complaint that "by giving said Bush & Hely credit therefor on their account" must be held to mean that the proceeds were placed to the credit of B. & H.; and if not paid over, or a fresh advance made, the plaintiff would be entitled to have and hold the specific bond, if kept by the defendant, or its proceeds, if converted or kept by the defendant. The same is true if the defendant applied, or undertook to apply, the bond or its proceeds upon "their account" against Bush & Hely.

The bond thus diverted, or the proceeds diverted, to the purpose of a security or application upon Bush & Hely's antecedent debt to the defendant, would not constitute the defendant a holder in good faith and for value, as against the plaintiff. (6 *N. Y.*, 144. 26 *id.*, 450. 49 *id.*, 286, 291. 31 *id.*, 509. *Turner v. Treadway*, 53 *id.*, 650.)

Even a person to whom Bush & Hely voluntarily delivered the bond upon an antecedent debt of their's could not hold against the owner. (58 *N. Y.*, 73.)

But the rule is now established that a *bona fide* holder for value, who has become such relying upon the apparent title or ownership of commercial or other property, to which is attached a power of sale and the evidence of title, acquires a good title to the extent of such fresh advances and fresh indebtedness incurred upon the strength of the apparent title, (*McNeil v. Tenth Na-*

Hopkins v. Ward.

tional Bank 55 *Barb.*, 59, as modified by Court of Appeals, 46 *N. Y.*, 325; 49 *id.*, 289; 11 *Wall.*, 378; 48 *N. Y.*, 586; 40 *id.*, 314; 43 *How.*, 360.)

The allegations that the bond was delivered to Bush & Hely, that they were then unsound, and that they failed and assigned on the 13th of November, are not material to the questions above stated; and the absence of an averment that the defendant knew of such insolvency, need not be considered, here.

We have thus reached the conclusion that the complaint contains a good cause of action as stated.

There was no affidavit of merits produced upon the argument of this motion. Indeed, the defendant's counsel in effect stated that the complaint contained the facts upon which the defendant was willing to rest the question of its liability. The motion must therefore be granted, and judgment ordered for the plaintiff, with costs of the action, and \$10 costs of this motion.

Judgment for plaintiff.

[AT CHAMBERS, LITTLE FALLS, February, 1876. *Hardin*, Justice.]

HOPKINS vs. WARD.

A new promise is sufficient to take a debt away from the effect of an antecedent discharge in bankruptcy.

A complaint, after setting out a complete cause of action upon a promissory note, stated, as a second cause of action, the making of a promissory note to the plaintiff, by the defendant, dated March 20, 1871, for \$300, for money loaned, payable sixty days after date, with interest, on which there was justly due, on the 1st of June, 1875, the sum of \$300 and interest, "less payments;" that in consideration thereof, the defendant, on that day, unconditionally promised the plaintiff to pay him the said sum of \$300, less a payment made May 18, 1872; and alleged as a breach, the non-payment of the balance of said amount. The defendant's answer contained no denial of the allegations of the complaint, but set up his discharge in bankruptcy,

Hopkins v. Ward.

granted Dec. 1, 1874. *Held*, that the allegations of the complaint, being material to the plaintiff's cause of action, and not denied by the answer, they must be taken as true.

Held, also, that the new promise, set forth in the complaint and made the foundation of the plaintiff's right to recover, being stated, and proved, to have been made after the defendant was discharged in bankruptcy, the right of recovery thereon was made out.

A promise to pay a debt barred by a certificate of discharge in bankruptcy becomes a new contract, and may be stated as the foundation of the action.

MOTION for a new trial, on the minutes, after a trial before the court and a jury.

After proof, by the plaintiff, of the balance remaining unpaid upon the account set out in the complaint, and by the defendant, of his discharge in bankruptcy, the court, upon the plaintiff's motion, directed a verdict for the plaintiff for said balance, \$239.94, April 26, 1876. The defendant claimed to have the burden of proof, and the claim was allowed to him.

After the verdict for the plaintiff was directed, the defendant made a motion for a new trial, upon the minutes. After argument of that motion, the court reserved its decision.

Chas. J. Everett, for the plaintiff.

E. E. Sheldon, for the defendant.

HARDIN, J. The complaint sets out a complete cause of action, upon a promissory note, and gives a copy of the note. The complaint then, secondly, states that in June, 1875, the plaintiff was the owner and holder of a promissory note, dated March 20, 1871, for \$300, made and executed by the defendant, "the consideration of which was \$300 loaned and advanced by said plaintiff to said defendant at that time, and by which the said defendant promised to pay, sixty days after date, the said sum of \$300 and interest, on which there was due and owing, on the said 1st day of June, 1875, the sum of

Hopkins v. Ward.

\$300 and interest," less payments; and "the said defendant, being so indebted to the said plaintiff, as aforesaid, and in consideration thereof, then and there *unconditionally* undertook and promised the said plaintiff to pay him the said sum of \$300, less a payment made May 13, 1872." And it also avers that "the defendant neglects and refuses to pay the *balance* of said amount, and there is justly due thereon the said sum of \$300 and interest, less the payments." * *

The defendant's answer contains no denial of the complaint, but it does contain an averment of a discharge in bankruptcy, granted Dec. 1, 1874; and that discharge was proven by the defendant.

It will be observed that the new promise is averred to have been made after the discharge, to wit, June 1, 1875.

It is conceded that a new promise is sufficient to take a debt away from the effect of an antecedent discharge in bankruptcy. (5. *Duer*, 299.)

It is provided by section 168 of the Code that "Every material allegation of the complaint not controverted by the answer * * shall, for the purposes of the action, *be taken as true*." The loan of the money is admitted; the giving of the note as the evidence thereof; the non-payment; that there is a balance justly due thereon to the plaintiff from the defendant; and that a promise to pay said loan was made June 1, 1875, are averred; and there is no denial of these averments. And if they are material to the plaintiff's cause of action, they must be taken *as true*.

It has been held, since the Code, that an action may be brought on the old demand, when the statute of limitations has run, and if the defence be interposed, the new promise may be given in evidence, to take the debt out of the statute. (*Philips v. Peters*, 21 *Barb.*, 351.) And the same doctrine is stated in *Esselstyn v. Weeks*, (12 *N. Y.*, 635.) See, also, 3 *Wend.*, 139, 189; 8 *N. Y.*, 308.

Hopkins v. Ward.

But a promise to pay a debt barred by a certificate of discharge in bankruptcy becomes a new contract, and may be stated as the foundation of the action. (*Henry v. Root*, 33 *N. Y.*, 537, and cases cited.) Lord Mansfield says: "Where there has been a new promise, after the discharge, the bankrupt is liable on a new contract." (*Doug.*, 192.) And in *Trueman v. Fenton* (*Cowp.*, 544,) it is called "a new undertaking and agreement." In *Stearns v. Tappin* (5 *Duer*, 295,) OAKLEY, J., says the same.

The new promise was stated in the complaint. It was made the foundation of the plaintiff's right to recover; and as it was stated to have been made after the defendant was discharged in bankruptcy, as he proves, the right of recovery was made out.

The defendant, by his answer and proof, supplied the fact which rendered the allegation of the new promise of the defendant a material fact; and as the defendant did not deny the new promise, he must abide the effect of it upon his loan of money from the plaintiff. If the defendant had made a denial of the new promise, in his answer, he would have driven the plaintiff to the proof of the promise.

Upon the facts alleged and proven, it is equitable and just that "the balance admitted to be *justly due from the defendant*" should be paid.

For the reasons above stated, the motion for a new trial, on the minutes must be denied, with \$10 costs.

Motion denied.

[HERKIMER CIRCUIT AND SPECIAL TERM, April, 1876. *Hardin*, Justice.]

In the matter of the appeal of ALBERTUS LEWIS *vs.*
THE CITY OF UTICA.

A party, by assenting to proceedings, aiding them, and approving them, until others act upon his assent and approval, contributes to the creation of an *estoppel* against himself, which binds him.

Proceedings taken for the opening of a new street in a city, up to the time of the first meeting of the commissioners, were had with the implied assent and approval of the appellant. He appeared at that meeting, and stated that he was an owner of land to be taken, and consented and desired that the street should be opened, "and in that way was a petitioner." He made no objection to the proceedings, until after the report of the commissioners was filed and he was informed of their conclusion. *Held*, that he could not be heard to raise technical objections to the proceedings he had thus promoted, assented to, and co-operated in until after a report therein was made which was a surprise upon him in respect to the amount of the assessment. His appeal was therefore dismissed.

In such a case, the maxim that "he who will not speak when he should, shall not speak when he would" applies.

PROCEEDINGS to open a new street, 500 feet from Mohawk street in the city of Utica. Commissioners were appointed by the recorder's court of the city of Utica, March 10, 1875, and an appeal taken by Albertus Lewis. It came on to be heard at the Lewis Special Term, and as there were disputed questions of fact, an order appointing H. C. Miller, Esq., referee, to take and report evidence, and his conclusions on the facts, was made. His report is now brought before the court, together with the original papers of the appeal.

J. M. Lindsley, for the appellant.

O. A. White and J. D. Kernan, for the city.

HARDIN, J. Section 90 of the charter of the city of Utica provides that "the qualification of the commissioners appointed under this section shall not be questioned by any person interested, except such as shall have appeared at the time of their appointment and specified their objections in writing to the court." The

objection of the appellant, that the papers used before the recorder did not show that the commissioners were freeholders, &c., must be overruled. It appears by the report of the referee that the commissioners were freeholders, &c., and therefore there is no force in the objection.

Section 94 of the charter provides that "the only grounds of appeal shall be a want of conformity of the proceedings to the provisions of this act; the propriety or utility of the improvement, or the equity of the award for damages or the assessment shall not be questioned on such appeal." The objection of the appellant to the expenses for printing, and to the commissioners' fees, or surveyors' fees, and serving notices, must likewise be overruled, in obedience to the language just quoted from § 94 of the charter; notwithstanding the quotation in the appellant's brief from page 462 of *Cooley on Taxation*.

The petition upon which the proceedings were founded was signed by Pheba C. Lewis, the mother of the appellant; and Ransom Lewis, his father, aided in getting up the petition therefor. They both resided on the premises affected, and Albertus Lewis, their son, resided with them; and the referee finds that the subsequent "proceedings had thereon, up to the time of the first meeting of the commissioners, were had with his implied assent and approval." The referee also finds that "at the first meeting of said commissioners for the purpose of taking evidence, said Albertus Lewis appeared with others interested therein. That he stated that he was an *owner* of land to be taken. * * He had met with them and *consented* and desired the said street should be opened, and in that way was a petitioner."

The referee finds "that said Albertus Lewis made no objection to said proceedings until after the report of the commissioners was filed and he was informed of their conclusion."

Barker v. Burton.

It is a familiar rule, that he who will not speak when he should, shall not speak when he would. A party, by assenting to proceedings, aiding them, and approving them, until others act upon his assent and approval, contributes to the creation of an estoppel against himself which binds him.

It has been repeatedly held that a party may waive a statutory and even a constitutional provision in his favor. (*Embury v. Conner*, 3 N. Y., 511. 8 Bosw., 103. *Houston v. Wheeler*, 52 N. Y., 641. *Phyfe v. Eimer*, 45 *id.*, 102. 38 How., 308.)

These principles applied to the facts found by the referee lead to the conclusion that Albertus Lewis cannot be heard to raise technical objections to the proceedings he has promoted, assented to and co-operated in, until after a report therein was made which was a surprise to him as to the amount of the assessment of lands, to protect which he appeared in the proceedings.

The appeal must be dismissed, with costs. (§ 94 of *Charter*.)

[HERKIMER SPECIAL TERM, April, 1876. *Hardin*, Justice.]

JOHN W. BARKER, President, &c., vs. CORNELIA
BURTON, impleaded with H. B. Burton.

In an action to foreclose a mortgage executed after the marriage of the mortgagor, but not given for the purchase-money nor executed by the wife, the latter is not a necessary party; and if she does not appear, the judgment properly allowable will not affect her prior and superior interest in the premises.

And if, after being served with the notice specified in § 181 of the Code, and subsequently with a stipulation that nothing in the judgment shall affect her claim to dower, the wife appears, and sets up the defence that she is not a necessary party, neither party will be entitled to costs, as against the other;

Barker v. Burton.

the plaintiff having unnecessarily made her a party, and she having unnecessarily defended.

Under the Code of Remedial Justice an extra allowance may be made to the plaintiff, in a judgment of foreclosure.

THIS was an action to foreclose a mortgage which was not executed by the wife of the mortgagor, and was not given for purchase-money. It was executed after marriage. Defence by wife that she was not a necessary party, &c. She was served with the summons, and a notice that no personal claim was made against her. On the 14th of December, 1876, she was served by the plaintiff with a stipulation that nothing in the judgment should affect her claim to dower.

Green & Comstock, for the plaintiff.

D. Bookstaver and L. R. Morgan, for wife.

HARDIN, J. The wife was not a necessary party to the foreclosure of this mortgage. If she had not appeared, the judgment properly allowable would not affect her prior and superior interest in the premises. (*Corn-ing v. Smith*, 6 N. Y., 82. *Lewis v. Smith*, 9 *id.*, 517. *Merchants' Bank v. Thomson*, 55 *id.*, 7. *Crary on Spe. Proceed.*, 280. 1 *Wait's Prac.*, 129, 134.)

Section 131 of the Code provides for service of notice that no personal claim is made. That notice was served, and subsequently a stipulation given. Certainly the defendant would not have suffered if she had omitted to defend, when she could not have been harmed by any judgment the plaintiff could or proposed to take against her.

That section provides that after such notice is given, the party who unreasonably defends may be charged with costs.

What reasonable ground has the defendant for defending, in such a case? Because the plaintiff unnecessarily made her a party, he ought not to have costs

Decker v. Waterman.

against her; and because she unnecessarily defended she is not entitled, as a matter of right or within the principles which govern a reasonable discretion, entitled to costs.

Judgment will therefore be entered without costs either to the plaintiff against her, or to the defendant against the plaintiff.

Had the plaintiff applied for judgment under the Code of 1848, he would not be entitled to an extra allowance, without a separate order; but this application was under the Code of Remedial Justice, which provides for such an allowance in the judgment asked for.

The plaintiff may have an order clause for two per cent.

Ordered accordingly.

[ONONDAGA SPECIAL TERM, May, 1877. *Hardin*, Justice.]

CORNELIA DECKER vs. JOHN H. WATERMAN and others.

By the terms of a will, property which had been the subject of previous gifts was, in legal effect, given, by specific bequests, to such prior donees. *Held*, that this amounted to a full and complete confirmation of such donations.

A testatrix, by her will, gave and bequeathed to M. W. and C. D. and their heirs, all the property "*left*" by her at the time of her death, to be equally divided between them, share alike; and directed as follows: "All property or valuable things heretofore disposed of, or given away, by me, shall not be taken into the account, in making said division." *Held*, that a clear intention was manifested by the testatrix that all previous gifts and presents by her made should stand ratified and confirmed; and hence, that property previously disposed of by gift and the possession delivered, was not embraced in the bequest.

Held, also, that a person claiming under the will, as devisee, could not question its validity. And that this court could not inquire into the circumstances under which the will was executed, after it had been admitted to probate by a tribunal having competent jurisdiction.

Held, further, that if, in any proceeding, the previous gifts of the testatrix should be held invalid, then, as to the property given, and the avails thereof, the testatrix died intestate, and a devisee would not be benefited by setting the gifts aside.

 Decker v. Waterman.

The fact that the relation of principal and agent exists, does not prevent the principal from making a voluntary donation to his agent. Such a donation is not absolutely prohibited by the rules of law.

But when it is established that such a relation exists between the donor and donee, before the validity of the gift will be upheld it must be made to appear that the transaction was unaffected by fraud, either actual or constructive. The burden of proof rests on the donee, to establish its perfect fairness and propriety.

What is sufficient and satisfactory proof, on which to declare a gift from a principal to her agent valid, and free from the taint of fraud or undue influence.

Undue influence consists in destroying the freedom of the donor's will, so as to make his act rather the will and act of the donee than his own. And such influence must be specifically directed to accomplish the thing done.

If the mind of the donor was brought to a purpose preconceived by the donee, for his own advantage, by an influence the donor could not escape, under the circumstances in which she was placed, and which was deliberately used to effect such purpose, then that influence, or its exercise, was undue and improper.

Testamentary bequests, made by a testator for the benefit and advantage of those who hold fiduciary relations towards him, are not judged altogether by the same severe rule that gifts *inter vivos* are. The same presumptions are not indulged in, as to fraud and undue influence.

A gift by will, by a *cestui que trust* to his trustee, by a principal to his agent, by a client to his attorney, or by a ward to his guardian, is upheld on less evidence that there was no fraud or undue influence, than is a gift *in presenti*.

Yet if the facts disclose that the person taking the benefit was instrumental in procuring the bequest, then the rule will not be modified, towards him.

Where the circumstances are such that, if a gift had been embodied in a will, as a bequest to the donee, and if the will had been offered for probate, no court would reject the same on the ground that the devisee procured the same by fraud, or the exercise of undue influence over the testatrix, then a gift *inter vivos*, made under the like circumstances, may be upheld, as against the claim of those who take by inheritance.

THIS action was brought for the single purpose of setting aside, and declaring void, a transfer of an interest in certain bonds and mortgages, made by Mary Decker, in her lifetime, to the defendant, John H. Waterman.

Mr. Thompson, for the plaintiff.

John H. White, for the defendant Mary Waterman.

Decker v. Waterman.

E. Porter, for the defendant John H. Waterman, executor, &c.

George Bullard, for the defendant Daniel Decker.

BARKER, J. The transfer in question was made by an instrument in writing bearing date March 1, 1865. Afterwards, and on the 18th day of November, 1867, Mary Decker made and executed a last will and testament. She departed this life on the 27th day of September, 1869, leaving such last will and testament in force and effect, and the same was duly admitted to probate on the 13th day of December, 1869, by and before the surrogate of Orleans county. The defendant John H. Waterman is named as executor, in such will, and letters testamentary were issued to him by the said surrogate, and he accepted the trust and entered upon the execution of the same. He is made a defendant in both his individual and representative capacity.

The plaintiff and the defendant Mary Waterman, who is the wife of the defendant John H. Waterman, are named as sole legatees, in said will; and to them the testatrix bequeathed all her property, in equal proportions.

As the terms of such devise, and the estate bequeathed, have an important and controlling effect in the determination of the case, the same will be copied here. They are as follows: "After all of my lawful debts are paid and discharged, I give and bequeath [to] my nieces, Mary Waterman and Cornelia Decker, and their heirs, all the property of every description, left by me at my death, to be equally divided between them, share alike. All property or valuable things heretofore disposed of, or given away by me, shall not be taken into the account in making the said division. And what portion of my property now possessed by me which I may dispose of

Decker v. Waterman.

before my death shall not be taken into such account, in making the division."

Notwithstanding it is manifest that the testatrix, by her will, confirmed her previous gift of these bonds and mortgages to John H. Waterman, and the plaintiff must be defeated in her claims, it will be well to find and state the business relation existing between the testatrix and John H. Waterman at the time of making the gift, and also the family ties that had been created and were in force and operating to guide and influence each, in their social intercourse.

After the death of Benjamin Decker, the husband of the testatrix, which occurred in December, 1864, Waterman, at the request of Mrs. Decker, assisted her in the management of all her business, visited her at her home in Cayuga county, and there aided in the management of her affairs; advised and assisted in the sale of the real estate belonging to her; converted the personal estate into money; collected debts; and when all the effects were converted into money and securities, Mrs. Decker accompanied him to his own house in Orleans county, he keeping the actual possession of the securities, and all future transactions being under his observation and management.

The power and authority actually conferred does not appear to be broad enough to make him a general agent, to act without consulting her, as business was transacted; but it was her manifest intention to submit all her business affairs to his supervision and management—that he should have the keeping and be the custodian of her securities and cash items. The relation of principal and agent was, in fact and in law, established. The real relation was very much like that of attorney and client; his office being, largely, to advise and guide her in the care, use and disposition of her property. The management that followed the making of the gift is strongly

Decker v. Waterman.

confirmatory of this view. The same continued up to the time of the death of the testatrix.

As to the family ties, and relationship, they were close, intimate and confidential, and had long existed. Mary Waterman was her own niece, and at one time was a member of her family. John H. Waterman, in early life, lived in the family of Benjamin Decker, and he and his wife regarded Waterman with almost filial affection. Upon the death of Benjamin, his widow, the testatrix, immediately summoned W. to her home, and brought him into the management of her affairs. She broke up her own home, disposed of her household effects, evidently intending never to keep house again, and went to the home of Waterman, where she lived most of the time, and died in his family. At the time of the assignment of the bond and mortgage to Waterman, it, with other securities, was in his custody, and the donor a member of his family, sick and under the doctor's care, needing much attention and careful nursing. In view of her age and the nature of her illness, there was reason to apprehend that it might terminate fatally.

From the evidence given, and the circumstances disclosed, such seems a fair statement of the business relation existing between the donor and the donee, and the opportunities he possessed to induce and influence her to make the gift. In its nature, Waterman's position was one of confidence, and his obligations were strictly fiduciary.

Before considering the question whether this gift can be upheld as an original transaction, I shall seek to determine whether it is now an open question.

When the will was made, the gift, in form at least, was a consummated transaction. The transfer of title was by an instrument in writing. No question is made but that it was the donor's deed—that she knew its effect and meaning. This is the more unmistakably so from the fact that by the terms of the instrument of con-

veyance she provided for the payment of legacies under her husband's will, which were a charge on her property received from the same source; and she also, by the same instrument, made a gift of \$1,000 to Mrs. Bevier. By the terms of the will, the property which had been the subject of previous gifts was, in legal effect, given, by specific bequests, to such donees. This must be treated as a full and complete confirmation of such donations. No other view can reasonably be taken of the provisions of the will, and such must have been the intention of the testatrix.

The devising clause of the will, in express terms, limits the effect of the same to the property "*left* by me at the time of my death." In the very next clause, the testatrix, in most explicit terms, excludes from the effect of the devising and granting clause "all property or valuable thing heretofore disposed of, or given away by me," and declares it "*shall not* be taken into the account in making the said division." The next clause in the will relates to property then owned by her, and excludes from the bequests so much of that as she might in her lifetime give away or dispose of.

A fair and reasonable interpretation of this indicates the clear intention of the testatrix that all previous gifts and presents by her made shall stand ratified and confirmed. At least it cannot be claimed that property previously disposed of by gift, and the possession delivered is embraced in the bequest. She has said to these legatees: "I do not give you such property; the same shall not be considered and taken into account in dividing between you the property I intend for you."

The plaintiff stands on this will; it is her title deed; she has none other; she does not, she cannot question its validity. This court cannot inquire into the circumstances under which it was executed; for it has been admitted to probate by a tribunal having competent jurisdiction.

Decker v. Waterman.

These considerations determine the case against the plaintiff. If the gift to Waterman be void for the reasons averred, and a court of equity could not uphold it as an original transaction, it would be of no advantage to the plaintiff to set it aside. In law, she must be treated as a stranger to that question, so long as she claims under the will. If this gift to Waterman be in any proceeding held invalid, then, as to that property, and the avails thereof, Mrs. Decker died intestate.

As the plaintiff seeks to investigate the transaction between the testatrix and Waterman and questions its validity, and the defendants have sought, by their proofs and arguments, to uphold the same as legal, free from fraud and undue influence, and as a just, equitable and proper gift, and a full consideration having been given; in that view of the case, I will express the conclusions at which I have arrived on both the facts and the law applicable to the same as an original affair.

In the first instance, I shall consider the validity of the gift, treating Waterman as an agent to Mrs. Decker, and acting as her attorney.

The fact that such a relationship exists does not prevent the principal from making a voluntary donation to his agent and attorney. The same is not absolutely prohibited by the rules of law. But when it is established that such a relation exists between the donor and donee, then before the validity of the gift will be upheld, it must be made to appear that the transaction was unaffected by fraud of any description whatever, either actual or constructive. The burden of proof rests on the donee, to establish its perfect fairness and propriety. And it is the duty of the court to search the evidence carefully, and be vigilant to ascertain the real nature and character of the transaction, and to learn the mind and motives of the giver. If such proof cannot be given, then the case will be treated as one of constructive fraud, and set aside. (*Cook v. Lamotte*, 11

Decker v. Waterman.

Law and Eq., 26; *Hoghton v. Hoghton, Id.*, 134. *Comstock v. Comstock*, 57 *Barb.*, 453. *Platt v. Platt*, 2 *Thomp. & C.*, 29. *Story's Eq. Jur.*, § 309, p. 315. *Hill on Trusts*, 4th ed., pp. 156 to 162, *marg. p. and cases cited in notes.*)

The burden of proof being cast on the donee, now the inquiry is—What is sufficient and satisfactory proof on which to declare the gift valid? Each case must necessarily be determined by the features it presents, and the surroundings of the transaction. When the relation is simply one of principal and agent—and I am considering this case in that view, only, in connection with these remarks—the proofs are usually held to be sufficient and satisfactory when they show that the donor knew what he was about; the value of the thing donated; the exact situation of the property; the effect it would have on his own estate; the condition in which he would be left; if the gift was effected by a deed, or an instrument in writing, that the same was read over and explained before execution, its contents being fully understood and comprehended.

That Mrs. Decker knew the value, extent and nature of her estate appears quite certain. It had but just come to her, by the devise and bequest of her husband, and largely from the avails of real estate then recently sold. It does not seem probable that Waterman could have deceived her, in the least, respecting it. It is not less sure and certain that she knew the contents of the assignment. Mr. Goff, the attorney who prepared it, testifies that before the same was prepared, the matter of it was talked over; and that before it was executed, it was read over to her, and she said it was right. The same instrument contained a provision for paying off and discharging the several bequests due to others, under her husband's will, and embraced a gift to a Mrs. Bevier, a niece of her husband. Nor do I doubt, from all the evidence, that she was fully aware that at that

Decker v. Waterman.

time she was parting with the title to those bonds and mortgages; that her mind was to make the gift to Waterman; that she saw in what condition it left her estate, and the means of support remaining to her thereafter. This conclusion is strengthened by the circumstance that she was in possession of her faculties, at that time, and made a will, by the terms of which she disposed of her property. The gift to Mrs. Bevier; the donation to Waterman; the provision to pay off the bequests in her husband's will, the only charge, probably, on her estate, and no debts outstanding; and the execution of the will; give the case every feature of a testamentary bequest, and should be largely considered as such, in judging of its fairness and validity. In my opinion it must be held, as a matter of fact, that she knew, and fully appreciated the situation; and that nothing existed, bearing on the transaction, that she did not know, and nothing was said to her that was not true.

The gift, then, must be upheld; unless there was an undue influence exercised, to produce the mind and purpose in Mrs. Decker to make to Waterman this transfer of property. In view of the business relation existing and the family ties and intimacy above set forth, the law does presume, as against the recipient of favor, thus situated, that he did exercise an undue influence. That the charge of undue influence is sustained, in the first instance, by showing an opportunity to exercise it, by the donee.

I am convinced that, judging of the evidence by the rules established as applicable to such cases, the donee has met the presumptions existing against him, has satisfactorily explained how the gift came to be made; that it is free from the taint of fraud or undue influence.

Let us briefly consider the case. Undue influence consists in destroying the freedom of the donor's will, so as to make his act rather the will and act of the

Decker v. Waterman.

donee than his own. And such influence must be specially directed to accomplish the thing done. (*Gardner v. Gardner*, 34 N. Y., 161.) If the mind of the donor was brought to a purpose preconceived by the donee for his own advantage, by an influence the donor could not escape, under the circumstances in which she was placed, and which was deliberately used to effect such purpose, then that influence, or its exercise, was undue and improper. (*Tyler v. Gardner*, 35 N. Y., 596. *Bergen v. Udall*, 31 Barb., 25.) As before remarked, this gift to Waterman should be treated largely as a testamentary affair. It certainly was concurrent with the making and publishing of a will and testament—both prepared by the same attorney, and executed with no less form and solemnity. Mrs. Decker was sick, and beyond much doubt, feared that she might not recover from such illness. By the terms of her will, together with the gift to Mrs. Bevier, and the gift to Waterman, she disposed of all her estate, designating, in all, four distinct persons as the objects of her bounty.

Testamentary bequests, made by a testator for the benefit and advantage of those who hold fiduciary relations towards him, are not judged altogether by the same severe rule that gifts *inter vivos* are; the same presumptions are not indulged in, as to fraud and undue influence. A gift by will by a *cestui que trust* to his trustee, by a principal to his agent, by a client to his attorney, or by a ward to his guardian, is upheld on less evidence that there was no fraud or undue influence, than is a gift *in presenti*. (*Hill on Trusts*, 158, margin and notes; *Hinson v. Wetherill*, 5 De G., M. & G., 301.) If, however, the facts disclose that the person taking the benefit be instrumental in procuring the bequest, then the rule would not be modified towards him.

There is no direct evidence in the case, that Waterman suggested this donation to himself. As against its validity, the whole proof rests in presumption. In the

Decker v. Waterman.

evidence of Mr. Goff, we have the idea suggested that before he was called in to prepare the conveyance, the matter had been up and considered, between Mrs. Decker and Mr. Waterman; for Goff states that when he commenced to draw the will, Mrs. Decker said to him that Waterman was going to pay off the legacies mentioned in her husband's will. The plaintiff and her husband testify, in substance, that in April preceding the transfer, and at the time Mrs. Decker came to their house in company with Waterman, he said, in speaking of her sickness "*that they did not expect her to live, and they got her to make a will,*" and made no mention of the assignment. Waterman denies making any such remark. Mr. Goff further states that he conversed with Mrs. Decker, and learned from her the provisions of the will then made, and that she communicated to him what she wanted done with the bonds and mortgages; that after they were prepared, the same being done in her presence, they were—both the will and the assignment—read over and explained to her, before execution; that the conversation about the business was had aside from the family; that Mrs. Decker, in speaking of Waterman, said that he had lived with them when he was a boy, and he got the impression from her remarks, that Waterman was brought up in their family. Mr. Miller, who was present and witnessed the execution of the will, confirms fully the statement of Mr. Goff, in most particulars, and also says that Mrs. Decker told him that she was distributing her property, and that she wanted Waterman to have the balance of mortgages, after paying Mrs. Bevier \$1,000, and the legacies.

If the usual reliance is placed on this evidence, such as is accorded to unimpeached witnesses, it goes very far in meeting the presumptions of the law, that the position and influence of Waterman brought Mrs. Decker's mind to the making of this gift, and to establish that it was her free act and disposition, being moved by feel-

Decker v. Waterman.

ings of kindness and affection towards Waterman. Waterman had done her no great favors, nor put her under many obligations, since the death of her husband. All that he had done had been compensated in a pecuniary reward ample and generous enough. No where in the evidence are the personal characteristics of Mrs. Decker described ; nor is it disclosed what was the strength of her mind, and the nature of her disposition. Whether she easily submitted to the suggestions of others, or not, cannot be very satisfactorily determined. It does appear, however, that by the will then made, she gave the balance of her property—some seven or eight thousand dollars—to the plaintiff and the wife of Waterman ; that they are her nieces ; and it is not disclosed that she had any other blood relations. Mr. Goff had acted, before this, as the attorney of Waterman, and afterwards acted as his attorney in defence of a suit prosecuted against him as executor of Mrs. Decker's will. This circumstance causes a degree of suspicion that the attorney was brought in to aid his client in effecting an arrangement beneficial to himself ; and that if friendly suggestions were needed to be made, they would not be omitted, on his part. Goff swears, however, that Waterman said nothing, beyond asking him to come to his house and prepare the will. If the negotiations were intended to be fair and honorable, the calling of his own attorney was also a very proper and natural course. It is a circumstance to be weighed in all its bearings.

I am fully convinced that if this gift to Waterman had been embraced in the will that day made and executed, as a bequest to him, and such will had been left by the testatrix to stand ; and the same were offered for probate, on the proofs here made, no court would reject the same on the ground that the devisee procured the same by fraud or the exercise of undue influence over the testatrix. (*1 Jarman on Wills, 44, and note.*)

The People v. Ingersoll.

I am unable to see why a gift *inter vivos*, made under like circumstances, cannot be upheld, as against the claim of those who take by inheritance.

The plaintiff has not seen fit, in any degree, to disturb the final accounting had before the surrogate, but has acquiesced in the decree made by the surrogate.

In view of the conclusion reached, that by the terms of the will the plaintiff has failed to establish any title to the property, she must pay the defendant, John H. Waterman, his taxable costs.

Judgment for defendants.

[ORLEANS SPECIAL TERM, October, 1876. *Barker, Justice.*]

THE PEOPLE *vs.* JAMES H. INGERSOLL, impleaded
with others.

Money borrowed upon the credit of county bonds which the county was authorized by statute to issue and is legally liable to pay, becomes the property of the county the moment it reaches the hands of the county treasurer, or is deposited and placed to his credit as such treasurer, in bank.

The chamberlain of the city of New York being, *ex officio*, treasurer of the county of New York, the receipt of money by him, as such treasurer, is a receipt of it by the county.

And where moneys so placed in the county treasury are, in pursuance of a corrupt, fraudulent and unlawful combination and conspiracy to that end, by individuals, drawn out of the treasury, and fraudulently divided between such persons and others, an action will lie against such persons, to recover the moneys back, and damages for the fraud perpetrated upon the county.

In such a case, the *county*, being the owner of the property fraudulently obtained, is the "real party in interest," and the proper party to bring the action.

The *people of the state*, by their Attorney-General, cannot maintain an action against the confederates to recover back the moneys so fraudulently taken and converted, or to recover damages for the fraudulent conspiracy and conversion.

No complete determination of the controversy in respect to such moneys, or damages, can be had, to which the *county* is not a party.

Power or right of the court to order an amendment of a complaint, upon the *trial*.

The People v. Ingersoll.

DEMURRER, by the defendant Ingersoll, to the complaint.

Francis C. Barlow (Attorney-General,) *Charles O'Connor*, *Wm. M. Everts* and *W. H. Peckham*, for the plaintiffs.

E. W. Stoughton, *D. D. Field* and *Elihu Root*, for the defendants.

HARDIN, J. On the 26th day of April, 1870, the defendant Hall was mayor of the city of New York, the defendant Connolly was comptroller of said city, and the defendant Tweed was president of the board of supervisors of the county of New York. On that day, the legislature passed an act entitled "An act to make further provision for the government of the county of New York," which contained, in its 4th section, the following, viz.:

"§ 4. All liabilities against the *county* of New York incurred previous to the passage of this act *shall* be audited by the *mayor*, comptroller and present president of the board of supervisors, and *the amounts* which are *found* to be due *shall* be *provided* for by the issue of *revenue bonds of the county of New York*, payable during the year 1871, and the board of supervisors *shall* include in the ordinance levying the tax for the year 1871, an amount sufficient to pay *said* bonds and the interest thereon. Such claims shall be paid by the comptroller to the party or parties entitled to receive the same, upon the certificate of the officers named herein." (*Laws of 1870, p. 878.*)

In October, 1871, this action was brought by the Attorney-General, and an order of arrest for "deceit and fraud" was issued by Justice Ingraham, holding the defendant Tweed to bail in the sum of \$1,000,000.

In December, 1871, a motion was made, at a Special

The People v. Ingersoll.

Term held by Justice Learned, at Albany, to reduce the amount of bail required of Tweed, and for further relief. In the opinion delivered by Justice LEARNED upon denying the motion, he refers to certain statements then in the complaint, in respect to collusions with the defendant Tweed, and adds that, "The question whether or not the plaintiffs can maintain such an action is one which needs thorough argument, and careful thought, for a correct decision. It ought not to be passed upon, on this motion, which is, as it were, an incidental proceeding in the action." That learned justice therefore refused, and properly refused, to pass upon the right of the plaintiffs to maintain the action as it was presented by the complaint, at that time. The order made by Justice Learned was affirmed at General Term, in February, 1872, in so far as the question of the plaintiffs' right to maintain this action is concerned, it must be assumed, in the absence of any opinion, without examining the question made, as to the plaintiffs' right to maintain this action.

In June, 1872, the defendant Tweed demurred to the complaint, and the argument of the questions presented came on for consideration, at a Special Term of this court held at Albany by the late Justice Hogeboom, who, after partial argument by counsel representing the respective parties, *pro forma* overruled the demurrer, and gave leave to the defendants to answer.

From that order an appeal was taken by the defendants, Tweed and Connolly, to the General Term, in the 3d Department. That appeal was heard in July, 1872, and in September the decision made at Special Term was, by a divided court, sustained, MILLER, P. J., and POTTER, J., delivering opinions for affirmance, and PARKER, J., in favor of reversal. (*See 13 Abb., N.S., 25 to 103.*)

Subsequently to that decision, upon a motion made

The People v. Ingersoll.

by the defendant Ingersoll, the 4th, 5th and 6th divisions of the complaint were stricken out.

The defendant Tweed made a motion to change the place of trial from the county of Albany to the county of New York. That motion was granted, at a Special Term held by Justice INGALLS, who held that the complaint charged upon the defendant Tweed "misfeasance and malfeasance performed by virtue and within the scope of his authority as an officer," as well as an abuse of the confidence which the law reposed in him, and, therefore, the 124th section of the Code applied, and required the venue to be changed. (*See opinion of Ingalls, J.; also Brown v. Smith, 24 Barb., 419.*)

The action brought by the *Board of Supervisors of New York v. Tweed*, (and one of the actions referred to in the original complaint in this action,) was heard at a Special Term in New York held by Barrett, J., upon a demurrer of the defendant to the complaint, and the demurrer was overruled. In the opinion of BARRETT, J., it is stated that the opinions delivered in this case by the General Term of the Third Department were "fully considered," and that, after such consideration, he was of the opinion that the General Term in the Third Department *had not* decided that the action in behalf of the supervisors of New York would not lie, and that the solution of the question as to whether the supervisors' action would lie or not was not necessary to the decision of the questions then before the Third Department, General Term. (13 *Abb., N.S.*, 156.)

An appeal was taken from the decision of BARRETT, J., upholding the supervisors' action, which was heard in November, 1872, in the First Department, and the decision of the Special Term was unanimously upheld.

The opinion of the First Department was delivered by its learned and experienced presiding justice, INGRAHAM; in which he clearly and succinctly states his views upon the question involved in the supervisors' action.

The People v. Ingersoll.

He says: "We consider the statute relating to boards of supervisors as authorizing such actions, and *entertain no doubt* as to the power of the plaintiffs (the supervisors of New York) to sue for money due to the county, which, in the complaint, was averred to be the property of the *county*.

"As to the decision of the court in the Third Department, in the action brought by the people, *we cannot* be bound by it on this question, as the expression of that opinion was not necessary to the decision of that case, and *especially* as such decision was rendered by a *divided* court.

Even the two judges who concurred in sustaining that action disagreed in the reasons which they assign for arriving at the same conclusion of law.

In the complaint in that case it was also averred that the suit of the supervisors was collusive, and that was admitted by the demurrer.

Our decision, therefore, is, that this action may be maintained by the board of supervisors." (13 *Abb.*, N.S., 158, 9.)

The decision last granted being in this department, and being later in point of time, and by a unanimous court, is entitled to respect, and stands as controlling authority upon the questions involved therein.

It must be assumed to be conclusively settled, by authority, that the board of supervisors of the county of New York "have the right to sue for money alleged to have been taken from the county treasury and misapplied."

This proposition is in harmony with the results reached, and the very able opinion of FOLGER, J., in *Newman v. Supervisors of Livingston County*, (45 N. Y., 676.) The opinion states "there can be no doubt then, that the statute law contemplated in a county so much of *corporate entity* as could own and hold real and *personal* property; could incur debts and liabilities;

The People v. Ingersoll.

could have and receive money into and pay it out from its own treasury, and keep account thereof; could have controversies with an individual and become liable to action from him, and be cast in judgment therein, under suits and proceedings like those against other corporations."

The complaint alleges that the fraudulent acts and wrongs complained of, (1,) were done under an act "to make further provision for the *county* of New York;" (2,) that *all* liabilities against the *county* previous to April 26, 1870, should be *audited* by the mayor, comptroller, and the then president of the board of supervisors of said county; and that the amounts found due should be *provided* for by the issue of revenue *bonds of the said county*, payable during the year 1871; and that the board of supervisors should include in the ordinance levying the tax for 1871 an amount sufficient to pay *said bonds*. That the comptroller caused to be issued bonds as prescribed by the act, (to wit, county bonds,) and obtained from *bona fide* purchasers thereof, prior to the 5th day of August, \$6,312,000, which sum was deposited in the National Broadway Bank of the City of New York, to the *credit* of an account therein, kept by the chamberlain of the city of New York, *as* county treasurer of said *county*.

The form of the bonds is given, and they are shown to be executed in behalf of, and in the name of the *county*, and *the county* is the *obligor*.

It is further alleged that the moneys so deposited were fraudulently drawn out of the said *bank* as stated in particular. That said claims or liabilities were never audited or examined by said board of auditors. A detailed statement is made of the manner in which, by means of false, fictitious and sham accounts and claims, the moneys were by the defendants' fraudulent acts, and "fraudulent and unlawful combination and conspiracy obtained from said bank, and so being obtained, were

The People v. Ingersoll.

fraudulently divided between the defendants and sundry other persons to the plaintiffs unknown." And then follows a demand of judgment, viz.: "And the said plaintiffs therefore demand judgment against the said defendants for the said sum of six millions three hundred and twelve thousand dollars, with interest thereon from the first day of September, 1870, and their costs."

The money was obtained in virtue of the statute, and the bonds having passed into the hands of *bona fide* holders, became binding upon the county. (*DeLafield v. The State of Illinois*, 26 Wend., 191; S. C., 2 Hill, 160. 13 N. Y., 625. *Brainerd v. New York and Harlem R. R. Co.*, 25 N. Y., 496. *Blake v. Supervisors of Livingston County*, 61 Barb., 169. *Lindsley v. Dieffenдорff*, 43 How., 358, 359, *opinion by Hardin, J.*)

The bondholders had ample remedies to enforce out of the county payment of the bonds. (*Buck v. City of Lockport*, 43 How., 361. *Blake v. Supervisors of Livingston Co.*, 61 Barb., 149.) The money having been borrowed upon the credit of the county bonds, and the county having become indisputably bound to repay the same, to the lenders, the money thus received upon the bonds of the county and its credit, the MOMENT it reached the chamberlain's hands or was deposited and placed to his credit as treasurer of the county, in the Broadway Bank, became and was the money of the county. The chamberlain is *ex officio* treasurer of the county. (*People v. Stout*, 23 Barb., 346.) As was said by FOLGER, J., in *Newman v. Supervisors of Livingston Co.*, (*supra*): "The receipt of that money by the treasurer was a receipt of it by the county."

The principle applied by GROVER, J., in *Bank of the Commonwealth v. Mayor &c. of N. Y.*, (43 N. Y., 188,) where moneys had been raised by taxation in part for city purposes, and were paid for county purposes, may be invoked to sustain this view. That learned judge says: "It further appears from the statutes, that a por-

The People v. Ingersoll

tion of the tax imposed was for the use and benefit of the defendant (the city,) and another portion for the county. When the entire tax was paid to the chamberlain, *he must be regarded as receiving that portion imposed for the defendant, as its treasurer, and the balance as county treasurer.* For the latter, the defendant (the city) cannot be held responsible, as the money cannot be regarded as ever having been received by it; *but the former was in fact so received by it.*" (43 *N. Y.*, 188.)

The moneys being in the hands of the chamberlain as *ex officio* treasurer of the county, and therefore belonging to the county of New York, were properly, under the act, *applicable* to the payment of the debts and liabilities of the *county of New York*; especially such as should be audited and certified in virtue of, and in conformity with, the provisions of the act of the legislature, of 1870. The comptroller was authorized to pay "such claims to the party or parties entitled to receive the same, upon the certificate of the officers named herein." He was made the agent of the county to pay or disburse the money of the county. The act of 1870 conferred new and additional duties upon him, and duties to be discharged virtually in behalf of the county. He became, *quoad* these *duties*, the agent or officer of the county. (17 *N. Y.*, 64.)

But instead of complying with the requirements of the law, it is alleged that he, in a fraudulent combination and conspiracy with the other defendants, fraudulently took to himself and delivered or caused to be delivered to the other defendants the funds or moneys aforesaid of the *county*, which had thus been obtained upon the *credit of the county*, by means of the revenue bonds issued in behalf of the county as above stated.

The complaint alleges that the accounts for which warrants were issued and delivered by the defendant Connolly, as comptroller, were "all false, fictitious and

The People v. Ingersoll.

fraudulent, and were made up and prepared by fraud and collusion," between Watson, Garvey, Ingersoll and Woodward, and the warrants were wrongfully and fraudulently issued for the payments of such pretended accounts out of the moneys so in said bank "pursuant to a corrupt, fraudulent and unlawful combination and conspiracy to that end, by and between the said Tweed, Watson, Garvey, Ingersoll and Woodward, agreed to be divided, and were divided between Ingersoll, Garvey and Tweed, and sundry others."

There are other allegations of details, entering into the fraudulent schemes of the defendants, showing more at large the manner in which they consummated their frauds, fraudulent schemes and conspiracy upon the treasury of the county, and obtained the said moneys of the county.

From the foregoing analysis of the complaint, as well as from its entire scope, it appears that the action is to recover back from the defendants the moneys so fraudulently obtained by them; or to recover damages for the fraud so perpetrated upon the county of New York.

It is to recover damages for a wrong perpetrated; not to prevent the commission of a wrong.

It will be assumed, upon the abstract of the complaint, and the authority already quoted, and the views expressed, that a good cause of action is stated against the defendants, in behalf of the county, and that it exists, complete and perfect.

The next inquiry that arises is—have the plaintiffs, the people, a right to maintain this action; or, in other words, can the people—the state of New York—by their Attorney General, maintain this action to recover back from the defendants the moneys so wrongfully taken; or recover damages for the fraudulent conspiracy, combination to defraud, and the consummation thereof by the means already alluded to, thus converting to their own use the \$6,312,000 stated to have been wrongfully taken by the

The People v. Ingersoll.

defendants out of the hands of an officer of the county, out of the possession, and from the county of New York?

At the outset of all consideration of this question, attention must be fixed upon the mandate of section 111 of the Code. That section, in terms, declares that "Every action must be prosecuted in the name of the *real party in interest*" except as otherwise provided in section 113.

Section 113 permits "an executor or administrator, a trustee of an express trust, or a person expressly authorized by *statute*," to sue without joining with him the person for whose benefit the action is prosecuted.

There is, in the section first quoted, the absolute requirement that the action shall be in the name of the real party in interest; and the section, with all the absolute character of its requirements, appears to embrace all actions not coming within some of the limited and restricted terms of section 113. No plausible or sound reason can be suggested which brings this case within the terms thereof.

Reference must be had to section 111 for the rule to be applied to this case. The peremptory requirement of the section calls for a demonstration that the people—the state—is the "real party in interest."

Taking the result already stated—that the moneys taken by the defendants wrongfully from the county, and the damages sustained by reason of the taking of the moneys, *belong to the county*, and applying it to the requirements of this statute, there would seem to be little room to doubt that the *county of New York* is the "real party" in interest; and being so, it would seem to follow, as a necessary consequence, that the "people of the state," the present plaintiffs, cannot, in any just and statutory sense, be considered "the real party in interest." Certainly not, in a sense which can answer the requirements of the section of the Code quoted.

The People v. Ingersoll

The view just expressed is not without authority directly in point and clearly supporting it. (*The People v. The Mayor of N. Y.*, 27 How., 34.)

The case of *The People v. Booth et al.* (32 N. Y., 397,) bears upon and supports the view herein stated. That action was brought "to restrain the defendants from intermeddling with the property pertaining to the fire department of the city of New York." The plaintiffs alleged that the property belonged to the city of New York, and that the defendants were wrongfully seeking to obtain possession of it without the consent of the corporation of New York. The court held that "The people of the state, to maintain an action, must show an interest in the subject of the litigation."

It was there tersely said in the able opinion of DAVIS, J., that "the people of the state, like all other parties to actions, must show an interest in the subject matter of the litigation, to entitle them to prosecute a suit and demand relief. This they have utterly failed to do, in this case, and for that reason the complaint ought to have been dismissed by the court below." That case was afterwards, in 1869, referred to in the opinion of BALCOM, J., in the *People v. Clark*, (53 Barb., 171,) and the rule and reasoning stated and approved. The *People v. Clark* was an action brought to restrain proceedings under an act of the legislature, for the purpose of bonding the town of Lebanon.

BALCOM, J., says: "All the people of the state are not interested in the question whether the taxable inhabitants of the town of Lebanon shall issue bonds of their town to aid the construction of the New York and Oswego Midland Railroad. And this action cannot be maintained by them by their Attorney-General, unless it is authorized by the statute." (3 R. S., 762, § 39, 5th ed.)

The spirit and effect of section 111 has been declared too often and clearly to be questioned or doubted. (*See*

The People v. Ingersoll.

opinions of Allen, J., and of Wright, J., 25 N. Y., 627, 632; 13 Wallace, 502.)

The complaint does not, in express terms, allege in the plaintiffs any interest in, or title to, the moneys taken and converted by the defendants. Nor do the facts constituting the plaintiffs' alleged cause of action make a case showing the plaintiffs to have the legal title thereto; or that the plaintiffs are the "real party in interest." But on the contrary, the facts constituting the cause of action against the defendants establish very satisfactorily and conclusively that the county of New York is "the real party in interest."

In this connection it may not be inappropriate to add that it is now well settled by authority, that no taxpayer can maintain an action to redress the wrong done by these defendants, or to recover the moneys fraudulently taken by them from the county in the manner stated in the complaint, and admitted for the purposes of this demurrer by the defendants. (*Doolittle v. Supervisors of Broome County*, 18 N. Y., 155. *Roosevelt v. Draper*, 23 *id.*, 318. *Phelps v. City of Watertown*, 61 Barb., 121.)

Having reached the conclusion that the county of New York owned the money fraudulently absorbed by the defendants, and is entitled to recover back the same, and to recover damages by reason of the wrongful acts of the defendants, stated in the complaint, it is manifest the plaintiffs cannot maintain this action upon the principles of the English cases quoted and reviewed in the able and exhaustive argument of the plaintiffs' learned counsel, before the court, and so fully examined by the learned judges who delivered the prevailing opinion in the 3d Department; unless they shall amend the complaint, and make the county of New York either a party plaintiff or a party defendant. (*Robinson v. Smith*, 2 Paige, 222. *Cunningham v. Pell*, 5 *id.*, 613. Code, §§ 117, 119.)

The People v. Ingersoll.

Certainly a complete determination of the controversy in respect to said moneys or damages, cannot be had in an action to which the county of New York is not a party. (*Code*, § 122.) If it were conceded that the plaintiffs are interested in a remedy which should effectuate a *return* of the money taken from the treasury of the county, analogous to the relief in the case of the *Attorney-General v. The Mayor of Dublin*, (1 *Bligh*, *N.S.*, 313,) still, it would be necessary that important amendments should be made. The facts stated do not bring the case within the reasoning of the *Attorney-General v. The Mayor of Dublin*. Especially is this true in respect to Ingersoll, who was not a public officer. The complaint is not framed for equitable relief against him. Only a case at law, asking for a judgment at law, is stated against him.

It was suggested by the learned counsel of the plaintiffs, upon the argument, that if such an amendment should be found necessary upon the trial, the court might, upon *the trial*, order the amendment. The power or right of the court, upon trial, to order an amendment which should change the scope of the action, or the parties necessary to maintain the action, is doubtful, if not wholly unauthorized. In *Davis v. Mayor &c. of New York*, (14 *N. Y.*, 506,) an amendment *upon the trial*, bringing in the Attorney-General as plaintiff, was made, and judgment then directed for the plaintiffs. It was subsequently reversed, and the amendment held to have been error. (See *Union Bank v. Bassett*, 3 *Ab.*, *N.S.*, 380. *Ford v. Ford*, 53 *Barb.*, 525. *Nosser v. Corwin*, 38 *How.*, 540. *Bailey v. Johnson*, 1 *Daly*, 61.) The last case holds that a change in the form of the action will not be allowed on the trial.

The learned senior counsel for the plaintiffs, in his argument, urges that this court should respect and follow the decision made by the majority of the judges in

The People v. Ingersoll.

the 3d Department when the demurrer of some of the defendants was considered.

The principle involved in the maxim "*stare decicis et non qujeta movere*," was referred to, and must be accepted and applied to this case, in reaching a result. What is the effect of its application here?

I. When the General Term decided the demurrer of the other defendants the complaint contained many allegations not now therein, and allegations upon which reliance was placed by the judges delivering prevailing opinions.

II. It was then assumed that the county of New York could not maintain an action to recover the moneys taken by the defendants; and that assumption has been completely taken away by the unanimous opinion of the General Term in this district in the case of the *Supervisors v. Tweed*, (*supra*;) and therefore the reasoning based upon that assumption has no force here, as an authority.

III. The opinions which were delivered as to the other defendants place some effect upon the circumstance that the defendants were holding public offices. Although it is not here considered that this defendant, Ingersoll, is less liable by reason of being a private individual, still that circumstance, as considered in the light of the reasoning in the opinions, lessens the force of the result as an authority. (*Cage v. Acton*, 12 *Mod.*, 288. 2 *East*, 469. 5 *Taunt.*, 155.) *Ratio legis est anima legis; mutata legis ratione, mutatur et lex.*

IV. The result in the 3d Department was reached by disregarding, if not by directly overruling, the case of the *People v. Miner*, (2 *Lans.*, 396,) in 1868. Since that case was decided, the doctrines thereof have been examined by the same learned jurist who delivered the opinion in 2 *Lans.*, 396, and the principles reaffirmed, by the General Term of the 4th Department, in the

The People v. Ingersoll.

People v. Albany & Susq. R. R. Co. (5 *Lans.*, 26,) unanimously.

It therefore appears that the cases immediately bearing upon one of the leading questions here involved are in conflict; and therefore this court, even at Special Term, is at liberty, as well as required, to rely upon the force of other cases applicable to the questions involved on this demurrer. Manifestly, such a course can in no just sense be considered as a disregard of the wholesome doctrine of *stare decisis*.

No doubt is entertained as to the liability of the defendant Ingersoll, as well as the other defendants, to respond for the great fraud in which he has been a participant. But his demurrer to the plaintiffs' complaint must be sustained, because the complaint does not state "facts sufficient to constitute a cause of action," in favor of the plaintiffs, the people of the state.

The demurrer of the defendant Ingersoll will be sustained; with leave to the plaintiffs to amend in twenty days, upon payment of costs.

Ordered accordingly.(a)

[NEW YORK SPECIAL TERM, March, 1878. *Hardin*, Justice.]

(a) *Affirmed* by the General Term in the 1st Department, and the latter decision *affirmed* by the Court of Appeals, after a re-argument. (58 *N. Y.*, 1.) The legislature subsequently passed an act authorizing the people of the state to sue in cases of this nature. (*Laws of 1875, chap. 49.*)

**ALICE S. MAGEE vs. GEORGE J. MAGEE, executor, &c.,
and others.**

M. and his wife, the plaintiff, who had separated and were living apart at the time, a suit brought by the wife for a limited divorce being then pending, settled such suit, in October, 1871; and on the 27th of that month, they executed an instrument by which it was agreed that the plaintiff should live apart from M., and the latter was to pay her \$5,000 yearly, and if she kept house, \$500 more. It was payable at a savings bank in S., in equal monthly payments, to the credit of the wife, so long as she should remain the wife of M. or continue his widow, &c. And for *securing* the prompt and regular payment of such annuity, M. covenanted and agreed that he would make and execute a valid will, and keep the same at all times in force, in and by which he should provide for the *fulfilment*, on his part, of said instrument, and make the payments, therein provided for, a lien and charge upon his estate. The wife covenanted and agreed that she would accept and receive the provision made for her support, in lieu of all claim, charge or incumbrance, in any way or manner, or *at any time thereafter*, upon M. or his representatives, or upon his estate. M. had, on the 9th of November, 1870, executed a will by which he directed his executors to pay \$2,500 to his wife, during her life, or until she should again marry. On the 30th of October, 1871, he added a codicil thereto, by which the said annuity to the plaintiff was revoked; and it was provided: "And I hereby give and bequeath to my said wife the sum of \$5,000 yearly, *to be paid* to her, each and every year, in monthly instalments, so long as she shall continue my widow." M. died in April, 1873. The principal question was, whether the plaintiff was entitled to receive, out of M.'s estate, \$5,000 a year during her life or widowhood, or \$10,000.

- Held*, 1. That the agreement of separation was valid and binding, and such an one as the parties might lawfully enter into; they being actually separated, and living apart, at the time it was made.
2. That the covenant of M. to pay \$500 a year if the plaintiff should keep a house on her own account, and occupy the same as her residence, was contingent; that she must rent and keep a house before the covenant would become operative, or the \$500 payable.
3. But that the covenant to pay an annuity of \$5,000 was not contingent; that it was absolute, and the liability to pay was fixed and settled, the moment the agreement was executed. That M. was under an operative covenant, and he and his estate were chargeable with the observance thereof; which was liable to be defeated only by her death, subsequent marriage, &c.
4. That beyond this covenant to pay the annuity of \$5,000, M. was bound to *secure* the payment thereof, by a testamentary provision for the "fulfilment" of such covenant by him.
5. That in the absence of any proof showing an intent on the part of the testator to be more liberal and generous with the wife, by donating an additional sum, than the terms of the agreement called for, the presumption

Magee v. Magee.

was that the giving of the annuity of \$5,000 named in the codicil was intended as a compliance with the agreement of the testator to provide for that sum; that it was inserted in the will as an intended fulfilment of such agreement. And that it should be held a satisfaction of the agreement, *pro tanto*, if availed of by the wife.

6. That the plaintiff was entitled to receive only the annuity of \$5,000; and to enforce the \$500 rental covenant whenever she should bring herself within its terms.

When the language of a codicil is clear; when no question arises as to the phraseology used; and no uncertain or ambiguous words are employed, the declarations of the testator to the scrivener who drew the codicil are inadmissible to establish the *intention* of the testator, at the time he executed the instrument.

But evidence of the facts and circumstances under which the codicil was executed may be received, and may be looked into in determining what inferences and presumptions arise.

THE plaintiff was married on the 26th day of June, 1867, at the city of Syracuse, to John Magee, and they lived together some two or three years and separated, she alleging his cruel treatment as the cause; and she brought a suit for a limited divorce, in this court, which was pending and about to be tried, in October, 1871. The action was settled by the parties and with the assent of the plaintiff's father and trustee, and the instrument of October, 1871, evidences the terms of settlement;—she was to live apart from her husband Magee, and he was to pay her \$5,000; and if she kept house, \$500 more. It was made payable at the Syracuse Saving Bank in Syracuse, in monthly payments, to the credit of Alice S. Magee.

The article of separation bears date 27th of October, 1871, and says: "And further, that he, the said party of the first part, shall and will well and truly *pay* OR CAUSE to be paid to the said Alice S. Magee, for her maintenance and support, the just and full sum of five thousand (5,000) dollars yearly, each and every year so long as the said Alice shall remain his wife or *continue his widow*, and she shall be deemed his wife until divorced by decree of courts of state of New York, to

Magee v. Magee.

be paid in equal monthly payments, the first whereof to be paid on the 9th day of November next."

The instrument also provides for the securing of such payments by directing the trustees under the will of John Magee then deceased to pay the said \$5,000, &c., or so much as shall at any time remain unpaid. "And for securing the prompt and regular payments of said above mentioned sums, the party of the first part covenants and agrees * * * that he the said party of the first part will make and execute in due form of law a valid last will and testament, and keep the same at all times in force, in and by which he shall provide for the *fulfilment* on his part of this instrument, and make the payments herein provided for a lien and charge upon his estate."

The will of the testator was made November 9, 1870; to which he added a codicil dated October 30, 1871. He died April 25, 1873. The instrument of October 27, 1871, also contains a covenant and agreement on the part of Alice that she would "in *all things accept* and receive the provisions above made for her support in lieu of all claim, charge or incumbrance in any way or manner, or at any *time hereafter*, upon the party of the first part or upon his representatives, or upon his estate." The testator, in his said will of 9th November, 1870, directed his executors to set apart such sum as would produce \$2,500 per year, and to pay \$2,500 to his wife Alice during her life, or until she should again marry.

By the codicil of 30th October, 1871, the said annuity to the wife was revoked, and the codicil further provided, "and I hereby give and bequeath to my said wife the sum of \$5,000 yearly, *to be paid* to her each and every year in monthly instalments, so long as she shall continue my widow."

At the time the codicil was prepared, the defendants claim certain declarations were made by the testator, as

Magee v. Magee.

to his object and purpose in executing such codicil. Nothing appears in the will upon the subject of such bequest, except the words above quoted. No provision is made in the will for the payment of said \$5,000 into any bank in Syracuse to the credit of Alice.

D. Pratt, for the plaintiff.

F. Kernan and Bradley & Kendall, for the defendants.

HARDIN, J. The principal question in this case is whether the plaintiff, Alice S. Magee, is entitled to receive out of her late husband's estate \$5,000 per year during her life or widowhood, or the sum of \$10,000, in virtue of the instrument of settlement dated 27th October, 1871, and the codicil dated 30th of October, 1871.

In considering this question it must be assumed that the instrument of 27th of October, 1871, was valid, and such an one as the parties might lawfully enter into. They had actually separated, and were living apart at the time such agreement was made.

The agreement was therefore valid ; and it was competent for the parties to bind themselves to the stipulations found in that instrument. (*Carson v. Murray*, 3 *Paige*, 501, and cases there cited.)

The covenant to pay \$500 per year, if said Alice "shall rent and keep a house on her own account and occupy the same as her residence" is contingent ; she must rent and keep house, before the covenant becomes operative, and nothing becomes due her by reason of such covenant to pay \$500 towards the rent "during and while she shall so rent and keep house as aforesaid," until she rents and keeps house.

No proof was given to establish her right to receive any sum as accrued to her by reason of any breach of that covenant. Nothing was due her thereon at the time

Magee v. Magee.

the codicil was prepared and executed by the deceased husband.

But the covenant to pay an annuity of \$5,000 was not contingent. It was absolute, and the liability to pay was fixed and settled the moment the instrument was executed, on the 27th day of October, 1871. The husband was under an operative covenant, and he and his estate were chargeable with the observance of the covenant, liable to be defeated only by her death, subsequent marriage or the divorce of the parties by a decree of the courts of the state of New York. Beyond this fixed and absolute covenant to pay \$5,000 per year, the deceased husband stipulated that for the further securing the prompt and regular payments, he "will make and execute in due form of law a valid last will and testament, and keep the same at all times in force, in and by which he shall provide for the fulfilment on his part of this instrument, and make the payments therein provided for a lien and charge upon his estate." The obligation was thus cast upon the deceased to "*secure*" the covenant by a testamentary provision—to be by him made in his behalf "for the fulfilment on his part of this instrument." Suppose he had delayed making any testamentary provision "in fulfilment on his part," and had continued in life, and she had sought by action to enforce the obligation to make such testamentary provision, and had succeeded in obtaining a decree requiring such provision, and it has been made under such decree; could it be doubted that it was simply in aid of his covenant, and in execution of his obligation to thus provide?

Inasmuch as the provision in the codicil contains no reference to the agreement, and does not declare, in terms, the intention of the testator to comply with his covenant to further provide for the payment of the annuity of \$5,000, it is proper to look at all the surrounding circumstances, the terms of the agreement, the

Magee v. Magee.

relations of the wife and husband at the time the agreement and codicil were made, the state of feeling then existing between them, to ascertain the intention of the testator at the time the codicil was made and executed. He had solemnly covenanted to provide for the fulfilment of the agreement on his part. The codicil, so far as the \$5,000 was concerned, was in the direction of the fulfilment of the obligation he had made with Mrs. Magee. There are no facts or circumstances disclosed in the case indicative of an intention on his part to do better by her than he had covenanted to do, when settling the suit she had pending against him for separation and alimony, at the time it was made. He had made himself legally liable to pay her \$5,000; he had created a liability which must rest upon his estate, in case of his death; and in the agreement he had stipulated to *secure* the payment of the \$5,000 by a testamentary provision. He had not taken the agreement with him from Syracuse; he called for his will, and caused to be drawn a revocation of the former legacy to his wife made in November, 1870. He caused it to be drawn in language which was ample to *further secure* her \$5,000 per year; it was put in form by the scrivener, and he then executed it, and it remained valid at his death in April, 1873.

No effort was made by his wife to have any other provision inserted in his will to further secure her the \$5,000 covenanted to be provided for by will. Nor does it appear that she had any knowledge of the codicil, until after his death.

All these facts, circumstances, and the provisions of the contract, being considered, it is difficult to draw a presumption from the codicil thus made, that the testator intended to do more than he had, three days before, covenanted to do for his wife. There are no circumstances disclosed, of a state of feeling or mind that may be supposed to have influenced him to greater con-

Magee v. Magee.

sideration towards her on the 30th of October, 1871, than he possessed on the 27th of October, when he was only willing to bind himself and his estate with the payment of an annuity of \$5,000.

In the case in 3 *Paige*, (*supra*,) the chancellor says : "The testator speaks of his wife in terms of great kindness and affection, notwithstanding the separation. I must *therefore* presume it was his intention to give her this as an *additional* allowance for her support, or as an inducement to her to relinquish her legal claim of dower, and thus to prevent any future litigation upon the question whether she was bound to elect between the annuity and her dower."

No such expressions of kindly feeling towards the wife are found in Magee's will, nor disclosed by the evidence, here. No need for any further inducement to his wife to relinquish her dower or other claim upon his estate.

All such relinquishment and release had been given him by his wife, three days before the codicil was prepared.

These circumstances, as well as others, distinguish this case from the principles and results laid down by the chancellor in *Carson v. Murray*, (*supra*.)

The circumstances and facts here warrant the presumption that the \$5,000 named in the codicil was intended to comply with the agreement to provide for that sum, and that it was inserted in the codicil as an intended fulfilment of the agreement, and that it should be held a satisfaction of the agreement, *pro tanto*, if availed of by the wife. (*Mulheran's Executor v. Gillespie*, 12 *Wend.*, 349.)

The cases cited by the learned counsel for the plaintiff, in respect to slight inequalities in the two provisions, have not been overlooked. But the rule laid down by ALLEN, J., in *Hine v. Hine*, (39 *Barb.*, 507,) seems to be reasonable, and must be followed.

Magee v. Magee.

ALLEN, J., says, at page 510: "If they are substantially the same, a small variance in the *time of payment*, or other trifling difference, will not vary the application of the rule." (*Story's Equity*, § 1110. 7 *Vesey*, 508.)

The proofs in this case fail to show an intent on the part of the testator to donate an additional sum—to be more liberal and generous with the wife than the terms of the agreement, and therefore it must be held that the testator was discharging his legal obligation in accordance with his sense of justice, when he raised the legacy from \$2,500 to \$5,000, and made the liability of his estate to his wife by the codicil equal to the fixed and absolute covenant. The omission to provide for the contingent liability to pay rental, leaves the agreement in that regard unaffected by the codicil; and when the facts precedent to her rights to the rental covenant arise, she will be entitled to assert and enforce them under the agreement.

The declarations of the testator to Mr. Bush, the scrivener who drew the codicil, were offered by the defendants, to establish the intention of the testator at the time he made the codicil. They were objected to by the plaintiff, and the question as to their admissibility reserved.

The declarations of intent ought not to be received. (*Williams v. Crary*, 4 *Wend.*, 451.) SAVAGE, Ch. J., says: "Parol testimony is inadmissible for some purposes, but for others it is indispensable. It cannot be received to give a construction to the language of a will, but to prove circumstances from which the court may draw inferences or presumptions." The language of the codicil to the will in this case is clear; no question arises as to the phraseology used; no uncertain or ambiguous words are employed. The objection must therefore be sustained. But the facts and circumstances surrounding the parties, and the circumstances under which the codicil was executed were received, and must

Magee v. Magee.

be allowed to stand in the case ; and they may be looked into in determining what inferences and presumptions arise. (*Trustees v. Colgrove*, 4 *Hun*, 367, and the cases cited in opinion of *E. D. Smith, J.*) These views lead to the conclusion that the plaintiff is entitled to receive only \$5,000 annuity, and she may have a provision inserted in the decree, if she shall serve a stipulation before entering the same, declaring her purpose to rely upon the codicil, or upon the agreement to enforce the payment of the annuity.

The decree must also preserve to the plaintiff the right to enforce the \$500 rental covenant whenever she shall bring herself within its terms.

Inasmuch as the decree will settle her rights, and give her the right to enforce them, and establish the extent of the liability of the defendants as executors, the judgment may be entered by the plaintiff in accordance with the views herein expressed, with costs payable out of the estate in the hands of the executors, the defendants.

Judgment accordingly.

THE SAME vs. THE SAME.

ACTION to recover unpaid instalments of annuity.

HARDIN, J. In this second action, the plaintiff is entitled to recover the unpaid instalments.

Courts of equity have jurisdiction to give such relief, even against executors and trustees. (1 *Story's Eq.*, § 593. 3 *Barb. Ch.*, 466.)

The evidence showed some funds in the hands of the executors, and they should therefore pay the sum past due to the plaintiff.

But the plaintiff, before entering the judgment, should

The People v. Tweed.

give the bond provided by the statute in such cases. The bond should be approved by a justice of this court, or a county judge, and filed, before the findings are signed and filed. There was no such bond tendered before suit brought, and therefore no costs will be recovered by the plaintiff, in this action.

Judgment for the plaintiff.

[ONONDAGA SPECIAL TERM, December 7, 1874. *Hardin*, Justice.]

THE PEOPLE vs. TWEED.

The writ of error is a writ of right, and issues as a matter of course, in cases of misdemeanor.

The direction for a stay of proceedings, on a writ of error, is not a matter of course, but rests in the sound judicial discretion of the officer allowing the writ.

When it appears that the points urged in support of an application for a stay of proceedings were raised upon the trial, and overruled by the judge presiding, as well as by another judge, upon a writ of *habeas corpus*; that the prisoner has voluntarily allowed considerable delay, since the trial, without presenting his case to an appellate court for review; that no application for a stay has been made to the judge who presided at the trial, nor to any other judge of that district; and the application is finally made to a judge outside of the judicial district in which the trial took place; it is a proper exercise of discretion for the latter judge to refuse the stay, with leave to withdraw the application, and without prejudice to any further application to another officer.

THE defendant, by his counsel George F. Comstock, David Field and E. R. Bacon, has made application for a writ of error with a stay of proceedings, to be issued to the court of oyer and terminer of the city and county of New York. The application is based upon the error-book containing 1064 pages of printed matter, the printed bill of exceptions containing 778 pages, and upon printed and oral briefs, consisting of numerous pages, and a citation of numerous authori-

The People v. Tweed.

ties. In conjunction with the presentation of such papers *ex parte*, no one appearing for the people, an oral statement was made of the several points principally relied upon to indicate error. Upon the trial, had before the court of oyer and terminer, before Hon. NOAH DAVIS presiding, some 200 exceptions were taken, not stated in detail or argued here.

It was conceded that no application for a writ of error had been made to the learned justice who presided at the trial, nor to any of the other five justices of the Supreme Court of said city of New York. It was also stated that the next General Term is appointed to be held in the city of New York, January 4, 1875, at which it was supposed the writ of error may be disposed of, in time to be presented for a hearing in the Court of Appeals, January 19, 1875.

It was also stated that Tweed, the prisoner, on the 29th of November, 1873, was imprisoned in the penitentiary at Blackwell's Island, and has ever since remained in such prison, under sentence; though no affidavit or other proof of such fact was presented.

Geo. F. Comstock, D. Field and E. R. Bacon, for the prisoner.

HARDIN, J. The learned counsel for the prisoner is correct in saying that the writ of error is a writ of right, and issues as of course, in cases of misdemeanor. In capital cases, such writ can issue only after notice given to the attorney general or the district attorney of the county where such conviction shall have been had. (2 *R. S., Edm. ed.*, 765.)

The 16th section of the statute provides as follows: "But no such writ of error shall stay or delay the execution of such judgment or sentence thereon, unless the same shall be allowed by a justice of the Supreme Court, or by a county judge, *with an express direction* therein

The People v. Tweed.

that the same is *to operate as a stay* of proceedings on the judgment upon which such writ shall be brought."

It has been held, in numerous cases, that the direction for a stay is not a matter of course; and that it rests in the sound judicial discretion of the officer allowing the writ of error.

In other words, that the judicial officer must exercise a discretion, in respect to the question as to whether, in the case before him, he shall direct or refuse a stay of proceedings. (*Hill v. The People*, 10 N. Y., 464. 3 *Parker*, 567. *People v. Folmsbee*, 60 Barb., 484.

In the application here made, three prominent points are made in respect to the regularity and correctness of the trial had in the oyer and terminer which sentenced the prisoner to confinement for twelve years, and to payment of some \$12,000 fine.

The leading points stated by the learned senior counsel relate, (1.) to the court in which the trial was had; (2.) to the imposition of successive sentences, each successive one to begin at the expiration of the prior; (3.) to the right of the accused to additional challenges to jurors; (4.) the constitutionality of the act of April, 1870, conferring duties upon the board of audit in the city of New York. The very clear and lucid statement made by the careful and astute counsel submitting this application seemed to render plausible his position.

But it must be borne in mind that the hearing is *ex parte*, and considerations may have been overlooked by counsel which have, and should have, great force in arriving to correct conclusions upon the points raised.

Furthermore, these very points were raised upon the trial, and discussed by very able counsel, and overruled after careful examination, as the case shows, by the learned justice who presided at the trial.

Recently an application was made to Justice Barrett for a writ of *habeas corpus*, and upon the return to that writ, it is understood, most if not all the points

The People v. Tweed.

here made were raised, and overruled by that learned officer.

If these points are well taken, they are of such a nature as to lead to a reversal of the judgment, either in the General Term, or Court of Appeals. The prisoner has voluntarily allowed considerable delay since the trial, without presenting his case to an appellate court for review, where such questions can be carefully and elaborately examined. Although that delay does not deprive him of the right of review, nor the right to a writ of error at this time, still it may not inappropriately be referred to in considering a question which rests in discretion. It appears the bill of exceptions was filed 14th of July, 1874.

But it is insisted that errors occurred upon the trial, which should induce a stay of proceedings pending the review.

The statement made upon this application, that a hearing can be obtained in the General Term 4th of January next, and probably in the Court of Appeals, indicates that no greater time will be required from now, to obtain the judgment of an appellate court, than the prisoner has voluntarily allowed to elapse without seeking a review, in the usual course, in such cases. This consideration is not without its force upon the question of discretion now presented by this application for a stay of proceedings.

It is quite common to apply for a writ of error, to the judge who presided at the trial, before applying to another.

The statute does not require such application to be made. But it has become quite common to pursue such a course in the first instance; to avoid, as much as possible, conflicting results apparently from co-ordinate officers.

Indeed, in cases of a criminal character, which have been had before an oyer held by me, such applications

The People v. Tweed.

have uniformly been made, and no writ with a stay of proceedings has been granted by another officer, after such conviction.

Such course is conducive to harmony ; and common courtesy among judicial officers is promoted by it.

This consideration should have its force in this case, inasmuch as this application is made outside of the judicial district in which the trial took place.

However, it would be within the power of the judge to whom this application is made to look into the questions made here, as to which error is alleged, and if fully satisfied that error was committed, to allow a stay of proceedings.

The same questions having substantially been raised before the justice who recently remanded the prisoner, when brought up on a *habeas corpus*, may be regarded as having been passed upon, for the purposes of this application, adverse to the prisoner.

That will not prevent a full and perfect review of the trial in an appellate court ; which can be had upon the writ asked for, and which the statute entitles the prisoner to have allowed as a matter of right. The considerations stated would lead me to refuse the stay, upon the papers now before me ; but as counsel desire to withdraw the application, leave is granted so to do ; and therefore this decision is without prejudice to any further application before any other officer, upon the same or additional papers.

Ordered accordingly.

[AT CHAMBERS, Little Falls, December 28, 1874. *Hardin*, Justice.]

ELIZA A. LYNCH *vs.* CHARLES H. PENDERGAST and others.

The third provision of a will was so framed as (1.) to carry to the executors \$44,000 "in trust to receive the income, issues and profits therefrom;" (2.) to "pay over the same semi-annually" from the death of the testator, to his wife, the plaintiff, for her support and maintenance for and during her life; and after her decease, the securities, so valued at \$44,000, were given and bequeathed, viz., \$10,000 to be held by the executors in trust, to pay over the income to the grandson James L., after the death of the wife, up to the time James L. should attain the age of twenty-one, and then, if the wife should have died prior to that time, the \$10,000 principal was to be *paid* over to the grandson "for his own use and benefit." It also made a provision in effect similar to that made for James L., for the granddaughter, Eliza L., and she was to have the income thereof till she was twenty-one years of age, after the death of the widow, and then the principal, \$10,000, was to be *paid* over to the said Eliza L., for her own use and benefit. The will also provided that in case either of the said grandchildren should die before the wife, the share of such deceased one should go to the survivor of such grandchildren. If both of the grandchildren died before the wife, then the \$20,000 was, at her death, to be divided equally between the testator's children, Mary J., John and Louisa. It also gave to his children "the remaining \$24,000 *herein set apart*, at the death of his (my) said wife, to be equally divided between them." By the 11th clause of the will, the testator directed his executors to *invest* the sums in his will "given to them in trust, in any good securities," and authorized them "to *change or vary* the investments and collect any of the securities held by him." By a codicil to said will, the life estate previously given to the wife was enlarged to an absolute estate in fee, "and to draw the income arising therefrom" as provided in the will; subject to the said provisions to the grandchildren; and the sum of \$10,000, given to the grandchildren was directed not to be paid over to them until each should attain the age of twenty-five years.

Held, that by the will and codicil, construed together, the plaintiff took, (1.) The "absolute estate," or sole ownership, of \$24,000 of the \$44,000; or, in other words, a legacy of \$24,000; (2.) And the right to the income of the other \$20,000, to be *paid* to her by the executors during her life; (3.) The income so paid to her was hers absolutely, to hold to herself and her heirs.

Held, also, that the executors should keep in trust \$20,000, invested in good securities, and pay the income to the plaintiff during her life; and in case she should die before the grandchildren named were twenty-five years of age, the income should be paid to them, or the survivor; and after that period should come, and such grandchildren should be twenty-five years of age, and the plaintiff should die, then the principal of the \$20,000 should be paid to the grandchildren, or the survivor, as provided in the will.

A will and codicil are to be taken in their several parts, and read and construed together as one instrument.

Lynch v. Pendergast.

It is the duty of the court to reconcile all the language employed by the testator, if possible; and to give such a construction as will carry it out and into effect.

The intention derived from the language used is to be the polar star, to guide in the construction to be given.

ACTION to obtain a construction of the last will and codicils of James Lynch, deceased.

The facts stated in the complaint were substantially admitted upon the trial.

The defendants appeared, and demanded a construction favorable to them respectively.

Sedgwick, Kennedy & Tracy, for the plaintiff.

L. W. Hall, W. C. Ruger, and D. Pratt, for the defendants.

HARDIN, J. The third provision of the will was so framed as (1,) to convey to the executors \$44,000 "in trust to receive the income, issues and profits therefrom;" (2,) to "pay over the same semi-annually" from the death of the testator to the plaintiff, the wife of the testator, for her support and her maintenance for and during her natural lifetime; and after the decease of the plaintiff, the wife, the securities, so valued at \$44,000, were given and bequeathed, viz. \$10,000 to be held by the executors in trust, to pay over the income to the grandson, James L. Pendergast, after the death of the wife, up to the time the grandson should attain twenty-one years of age, and then if the wife should have died prior to such majority of the grandson, the \$10,000 principal was to be *paid* over to the grandson "for his own use and benefit."

It also made a provision, in effect, similar to the one stated to James L., for the granddaughter Eliza L. Pendergast, and she was to have the income thereof till she was twenty-one years of age, after the death of the

Lynch v. Pendergast.

widow, and then the principal, \$10,000, was to be *paid* over to the said Eliza L. for her own use and benefit.

The will also provided that in case either of the grandchildren aforesaid died before the wife, the plaintiff, the share of such deceased one should go to the survivor of such grandchildren. If both of the grandchildren died before the wife, then the \$20,000, at her death, was to be divided at the death of the wife equally between the testator's children, Mary J., John and Louisa. It also gave to his children "the remaining \$24,000 *herein set apart* at the death of his (my) said wife," to be equally divided between them. It will be observed that the testator by the last words quoted alludes to the \$24,000 as "set apart;" thus treating it as in some sense independent of the major sum; and as an independent portion of the whole \$44,000.

So, too, by the 16th clause of the will, the testator directed his executors to *invest* the sums in his will "given to them in trust, in any good securities," and authorized them "*to change or vary* the investments and collect any of the securities held by him." This provision, with other portions of the will, suggests the idea that the testator contemplated the keeping of a fund of \$44,000 to be disposed of under the will, both as to principal and income, as stated. The executors were clothed with the right of possession, the power of changing and varying the securities. In the codicil of April 17, 1870, are found these words: "Third. Whereas, by the third item of my said will the estate therein left to my said wife Eliza is a life estate *only*, now this writing witnesseth that I desire the said estate to be an absolute estate in my said wife, and to draw the income arising therefrom as provided in said will, and I hereby give the same to my said wife, to have and to hold the same to her and her heirs forever; subject to the provision to my said grandchildren." In this same codicil, and just preceding this third provision quoted, are to be found

Lynch v. Pendergast.

these words: "Second. Whereas by my said last will I directed \$10,000 each to *be paid over* to my said grandchildren when they shall attain the age of twenty-one years; I hereby declare my will to be that the same shall not be paid over to my said grandchildren until each shall attain the age of twenty-five years."

These words are important, because found in the same codicil which is made the subject of discussion in this action.

They are to be read in connection with the words of the "third" item of the will, and the "third" item of the codicil, and full effect is to be given to them, if, consistently with a proper regard for all parts of the will and codicil, their meaning can be ascertained.

The will and codicils are to be taken in their every part and read and construed together as one instrument. (*Westcott v. Cady*, 5 *John. Ch.*, 334.) If the effect of the "third" item in the codicil should be held to be to carry the whole \$44,000 absolutely to the plaintiff, subject only to the right of the grandchildren to call upon the estate of the widow after decease, then no effect could be given to the change made by the second clause of the codicil, unless a trustee should be appointed to hold the funds until the grandchildren should attain twenty-five years of age; in the event of the death of the mother before the grandchildren reached twenty-five years of age.

The "second" item of the codicil favors the idea that the testator's intention was, at the time the codicil was drawn, to keep up the provision in respect to the grandchildren, found in the will; that the "*provision*" in the will, made for them, should be modified, to the extent of further postponing the period when they might receive the principal from the executors or trustees.

So, too, the words in the third item of the codicil, "and to draw the income arising therefrom as provided in said will," suggest that the intention was to allow the

Lynch v. Pendergast.

widow to have the income of that portion of the \$44,000 not "set apart" to her, to wit, the \$20,000. If these words, "and to draw the income arising therefrom as provided in said will," were not followed by other words, to wit, "and I hereby give the same to my said wife, to have and to hold," &c., there would not be quite so much strength in this view. But it is obvious no such words were needed, to follow an absolute estate.

If the intent was to give her an absolute estate in the whole \$44,000, why use the words, "and to draw the income arising therefrom as provided in said will?" Why add "and I hereby give the same to my said wife?" The words, "I desire the said estate to be an absolute estate in my said wife," would have been ample and effectual to carry out the whole intent, if that had been the sole object or the object of the testator. The words, "and to draw the income arising therefrom as provided in said will," do not seem appropriate, or used, for the purpose of conferring upon her the power to draw the income upon the specific securities. If she took an absolute estate in the whole \$44,000, that would give her power to draw the income of any securities. There would be little use of being authorized "to draw," "as provided in said will."

But the words found at the close of the third item of the codicil must have full effect given to them; and they relate to and qualify the anterior expressions of that whole third item.

The testator having "set apart" \$24,000, for his wife, and having authorized her to have only the income thereof during life, conceived an intention to give and bequeath to her the "absolute estate" therein, and to authorize her to draw the income upon the other \$20,000, and to have that income absolutely during her life, keeping the principal of the \$20,000 intact for the grandchildren. He therefore changed the period when, if they survived the grandmother, they could come to the

Lynch v. Pendergast.

possession of the principal, and extended it from the age of twenty-one years to the age of twenty-five years.

This view of the will and codicil does seem to give effect to all the language employed by the testator; and such construction as carries out and into effect all the language used must be adopted.

It is the duty of the court to reconcile all the language found, if possible. (27 Barb., 431. *Theological Sem. of Auburn v. Kellogg*, 16 N. Y., 83.) And the intention derived from the language used is to be the polar star, to guide in the construction to be given. (6 Peters, 68. 5 Paige, 318. 27 Barb., 431. 9 Paige, 521.)

The plaintiff takes, (1,) the "absolute estate," or sole ownership of \$24,000 of the \$44,000; or, in other words, a legacy of \$24,000; (2,) and the right to the income of the other \$20,000 to be *paid* to her by the executors during her life; (3,) the income so paid to her is hers absolutely, to hold to herself and her heirs. And the executors should keep in trust \$20,000 invested in good securities and pay the income to the plaintiff during her life, and in case she dies before the grandchildren aforesaid are twenty-five years of age, then the income should be paid to them, or the survivor, and after that period shall come and the grandchildren shall be twenty-five years of age, and the plaintiff dies, then the principal of the \$20,000 should be paid to the grandchildren, or the survivor, as provided in the will.

Judgment accordingly.

[ONONDAGA SPECIAL TERM, December 7, 1874. *Hardin*, Justice.]

FRANK J. BALTIS *vs.* SARAH F. DOBIN, THE SECURITY
INSURANCE COMPANY and MORGAN S. FROST.

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M., being the owner of a steam tug boat, executed a mortgage thereof to the plaintiff, to secure the payment of \$3,650, in which he covenanted to insure the boat and keep the policies assigned to the mortgagee, and in case the policies were not kept up, the latter was authorized to insure and charge the premiums to M. Subsequently, M. executed a second mortgage on said boat to D., to secure \$3,000, which contained a similar provision as to insurance. Later, M., by a bill of sale, sold three-fourths of the boat to F., subject to said mortgages, F. assuming to pay the sums due thereon, having previously become the owner of the other one-fourth of said boat by a purchase subject to the terms and conditions of the first mortgage. F. caused the boat to be insured, in the sum of \$5,000, the policy providing that the loss, if any, should be payable to the mortgagees, to the amount of their interest. A loss occurred, to an amount exceeding the sum insured, and the liability of the insurers became fixed.

Held, 1. That, as between the mortgagees and F., the former were entitled to have their mortgages paid, out of the insurance moneys, before F. was entitled to any portion thereof.

2. That F. being the party insured, and having sustained the loss, he was, to the extent of that loss, within the limits of his policy, entitled to be compensated in damages payable by the insurer.
3. But that, as between F. and the insurance company, the mortgagees were the appointees to receive the loss; and they were the real parties in interest, and, to the extent of their respective mortgage debts, were entitled to maintain an action against the insurers.
4. That the insurer, by issuing a policy to F. with a provision that the loss, if any, was payable to the mortgagees, made it a part of its contract that the funds arising upon a loss should be held by it in trust for the mortgagees; or, in other words, it was a part of the contract that the same should be paid to the mortgagees.
5. That as soon as the policy was delivered, the insurance company became liable to pay to the mortgagees, *ratably*, any loss that might happen; and that liability had ripened, by the happening of the loss, into a debt due the mortgagees respectively. And that F. was entitled to the balance of the insurance money, if any should remain after payment of the mortgage debts.

ON the 12th day of March, 1869, J. D. Murphy was the owner of a steam tug boat or vessel called the "George S. Dodge," and on that day he executed a mortgage thereof to the plaintiff and one Joseph Baltis (who subsequently assigned to the plaintiff,) to secure

Baltis v. Dobin.

\$3,650, on which mortgage there remains due about \$3,000; in which mortgage he covenanted to insure her, and keep the policies assigned to the mortgagees, and in case the said policies were not kept up, the mortgagees were authorized to keep up the policies and charge the premiums to the mortgagor.

On the 26th of April, 1869, Murphy made a chattel mortgage on said boat to the defendant Dobin, to secure \$3,000, which mortgage contained similar provisions as to insurance.

On the 27th of January, 1870, Murphy, by a bill of sale, sold three-fourths of said vessel to the defendant Frost, subject to the Baltis mortgage, on which there was unpaid \$2,434, and also subject to the Dobin mortgage, of which it is stated "the said tug owes \$2,000;" which sums the said Frost assumed to pay. Prior thereto Frost had become the owner of the other one-fourth of said boat by a purchase subject to the terms and conditions of the Baltis mortgage.

On the 7th day of June, 1870, the defendant, the Security Insurance Company, issued its policy of insurance covering said vessel, insuring the said Frost, in consideration of \$250 premium paid by him, in the sum of \$5,000, with a provision therein: "*loss, if any, payable to Frank J. Baltis and S. A. Dobin to am't of their interest.*" Thereafter, and about the 28th of September, 1870, the steam tug was lost and destroyed, and proper proofs were made and delivered to the insurance company, establishing the loss. The evidence in this case shows the loss to have been to an amount exceeding the said \$5,000; and the insurance company is liable to pay, by reason of said loss, the sum of \$5,000 and interest. No question is made as to the validity of each of the mortgages, and the proof establishes the liability of the insurance company to pay said \$5,000 and interest.

Baltis v. Dobin.

S. A. Webb, for the plaintiff.

W. A. Poucher, for the defendant Dobin.

HARDIN, J. Upon the trial of this action, no reason was offered by the insurance company against a recovery of the \$5,000 and interest, according to the terms of the policy issued by it; and no question arose as to the rights of the defendant Frost, it being conceded that the mortgagees are entitled to recover the amount of their respective mortgages, and to be paid the sums due thereon prior to the right of the defendant Frost. It is clear that, as between the mortgagees and Frost, the former are entitled to have their mortgages paid out of the insurance moneys before Frost is entitled to any portion thereof, and no question is made in respect thereto by any of the parties to this action.

The chief question made upon the trial was as to rights of the respective mortgagees.

Frost, at the time of the execution of the policy of insurance, and at the time of the happening of the loss, had an insurable interest in the vessel, and therefore effected and held a valid policy, upon which the insurer was liable. (*Carpenter v. The Providence Ins. Co.*, 16 *Peters*, 496. *Tallman v. The Atlantic Ins. Co.*, 29 *How. Pr.*, 71.)

This is important, since it has been settled that unless Frost is entitled to recover, the plaintiff and Dobin would not be; it is the damage sustained by the party insured and not by the party appointed to receive payment that is recoverable from the insurers. (*Grosvenor v. Atlantic Fire Ins. Co.*, 17 *N. Y.*, 391. 19 *id.*, 179. *Macomber v. Cambridge Mu. Fire Ins. Co.*, 8 *Cush.*, 133.)

Frost was the party insured; he has sustained the loss, and to the extent of that loss, within the limits of his policy, he is entitled to be compensated in damages payable by the insurance company.

Baltis v. Dobin.

The contract of insurance being one of indemnity, the insurer undertakes to save the assured against damages by reason of the loss of the property covered by the policy.

But as between Frost and the insurance company, by the terms of the policy, the plaintiff and the defendant Dobin are the appointees to receive the loss, and they are the real parties in interest, and to the extent of their mortgage debts, would be entitled to maintain an action against the insurer. (*Flanders on Insurance*, p. 588. 45 *Barb.*, 384. 29 *id.*, 552. 29 *Maine*, 337. 3 *Keys*, 416; *S. C.*, 5 *Abb.*, *N.S.*, 201.)

The insurer, by issuing a policy to Frost with a provision that the loss, if any, was payable to the mortgagees, made it a part of its contract that the funds arising upon a loss should be held by it in trust for the mortgagees; or, in other words, it was a part of the contract that the same should be paid to the mortgagees. (*See opinion of Bosworth, J.*, 5 *Duer*, 537.)

Although this last case was reversed in 17 *N. Y.*, (*supra*), it was not reversed upon this point. Nor could Frost have maintained an action on the policy in this case, in his name alone, without alleging and proving that the mortgages to Baltis and Dobin had been fully paid, and that they had ceased to have any interest in the policy. (*Ennis v. Harmony Ins. Co.*, 3 *Bos.*, 516.)

And in 17 *N. Y.*, 395, Judge HARRIS took occasion to say "that there is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee, to be held by him as collateral security for his debt with the consent of the insurer." The terms agreed upon in the policy of the defendant, the Security Insurance Company, provide for the payment of the loss to Baltis and Dobin, who are to receive the money as the appointees or assignees of Frost. It was the vessel that was insured, the interest therein of the defendant Frost, and not the mortgage interest held by

Baltis v. Dobin.

either the plaintiff or the defendant Dobin. (*Bidwell v. North Western Ins. Co.*, 19 N. Y., 182, 3.)

When the policy was made which is the basis of the recovery in this action, the party insured was in possession of the vessel, and held her expressly subject to the Baltis and the Dobin mortgages, and he was resting under a covenant in respect to those mortgages to the effect that he would pay them. They were liens upon his property, and he was alike responsible by his personal covenant to pay them; as between him and Murphy, he was the principal debtor, and Murphy was surety, liable to be called upon to pay after the lien had been exhausted, and the responsibility of Frost. In respect to both mortgages, Frost was the owner of the equity of redemption, and as such owner effected the insurance.

That equity of redemption, the vessel itself, was insured at the instance of Frost, he paying the premium therefor, and, as before shown, appointing the persons to receive the payment thereof from the insurance company in case a loss should, as it did, happen.

It is difficult to see why he could not have named the second mortgagee, as his appointee to receive the money in question, and thereby given him the sole and absolute right to receive the same and apply it to the payment of his mortgage at least to the extent thereof; but instead thereof, he chose to name both as the appointees, or assignees of the insurance money.

That act of appointment or assignment is clear and distinct, and leaves no room to doubt what was his intention in respect thereto, evincing a clear purpose to appropriate any moneys that should become due and payable upon the policy to both mortgagees.

The rights of the respective parties were fixed by the terms of the policy—assented to by the insurer, the assured and the appointees. There is some evidence that the terms of the policy were known to Baltis and acqui-

Baltis v. Dobin.

esced in by him long before any loss happened, no objection having been taken thereto.

The plaintiff has urged his right to recover in this case upon the doctrine of an equitable assignment, and the cases in 39 *Barb.*, 227, and 44 *N. Y.*, 42, are relied upon as supporting such right; and it may be observed that the defendant Dobin stands like the plaintiff in respect to the provisions in the mortgages, as the covenants of Murphy to insure and keep insured are found in each, and the covenants of Frost to pay both mortgages are found in the bill of sale which he took when he became the purchaser of the property subject to the mortgages respectively.

The rights of the parties attached and became vested at the time the policy was issued, and delivered to Frost, each mortgagee being entitled to receive out of the insurance moneys made payable by the policy a sum sufficient to retire the respective mortgage debts. That right was assented to by all the parties to the contract. Suppose Frost had executed a mortgage on another vessel to both the mortgagees and delivered it to them, or had obtained a policy of insurance on another vessel and stipulated that in case of loss the same should be payable to the mortgagees named in the two mortgages held by Baltis and Dobin and delivered them as further collateral security; would it be doubted that they would, as such holders or appointees, take the avails thereof ratably?

So in this case the defendant, the insurance company, was liable to pay any loss that might happen, as soon as the policy was delivered to the mortgagees, ratably, and that liability has ripened by the happening of the loss into a debt due the mortgagees respectively. (3 *Paige*, 516.)

The judgment to be entered in this case will provide for payment of said \$5,000 (and the interest to the day of entering the judgment) to the mortgagees ratably,

Spears v. Lake Shore and Michigan Southern R. R. Co.

and the balance of said \$5,000 and interest, after payment of the said mortgage debts, to the defendant Frost.

The defendant Dobin has only claimed a ratable share of said loss, and hence no other question has arisen in respect to his share in the loss recoverable. And the judgment will provide that in case the said \$5,000 and interest shall not be paid in full by the insurance company, then the loss if any will fall upon the mortgagees ratably.

The judgment may provide for recovery by plaintiff of taxable costs (exclusive of trial fee) of the insurance company; and in case they are not collected in full then with trial fee, the costs of plaintiff payable out of the \$5,000 and interest, and Dobin's taxable costs, will be payable out of said fund. No other costs allowable, to any of the parties.

Judgment accordingly.

[ONONDAGA SPECIAL TERM, December 7, 1874. *Hardin*, Justice.]

**SPEARS & GREGORY vs. THE LAKE SHORE AND
MICHIGAN SOUTHERN RAILROAD COMPANY.**

The defendant was one of the companies forming a continuous and connecting line of railroads from Titusville to Boston, engaged in the business of transporting oil and other freight from the former to the latter place. By an arrangement between such companies, cars loaded with freight were run from each terminus over the whole length of said line. The plaintiffs, being shippers of oil, at Titusville, provided and furnished wooden tanks of their own, suitable for holding oil to be transported over the said continuous line, from T. to B.; and, by an arrangement between them and one of the companies, such tanks were placed on platform cars belonging to that company, and fastened thereto, for safety, but they were to remain the property of the plaintiffs. Cars, with tanks thereon, filled with oil belonging to the plaintiffs, were run between T. and B. After the tanks were emptied of their contents, at B., the cars, with the empty tanks thereon, were, by the same line, returned to T. The carriers furnished the plaintiffs with a bill of lad-

Spears v. Lake Shore and Michigan Southern R. R. Co.

ing, for each shipment of oil, specifying the quantity of oil, but no mention was made of the tanks themselves. No bill of lading was furnished on the return of the empty tanks; nor was any consideration paid for the transportation of such empty tanks, independent of that paid for the transportation of the oil from T. to B.; nor was any special arrangement made as to the return transportation. Two of said tanks, filled with oil, owned and shipped by the plaintiffs, to B., while being carried on said cars, and while on that part of the line owned and operated by the defendant, were, with their contents, burned up and destroyed.

Held, 1. That the general business of the defendant was that of a common carrier; and if it was, in fact, or in a legal sense, transporting, for hire, the tanks destroyed, then the plaintiffs' claim against it, for the value of the tanks, was established.

2. That under the arrangement made by the plaintiffs with the railroad companies, the latter assumed, as to the tanks, the unrestricted liabilities of common carriers.

3. That although no compensation was paid to the companies, directly, for the transportation of the empty tanks, yet that they received a compensation in a legal sense, in the payment of freight on the oil; and that the plaintiffs were entitled to recover the value of the tanks destroyed.

TRIAL at the Erie circuit. Jury waived. The following facts were either proved or admitted on the trial.

1st. The plaintiffs are copartners, engaged in shipping oil from the oil fields in Western Pennsylvania to Boston, by railroad.

2d. The Buffalo and Erie Railroad Company was a common carrier of goods from and between Erie, Pa., and Buffalo, N. Y. It was consolidated into the Lake Shore and Michigan Southern Rail Road Company, and the latter company became liable to suit for causes of action against the former railroad company.

3d. On and prior to the 11th day of November, 1867, there was a continuous and connecting line of railroads between the village of Titusville, Pa., and the city of Boston, Mass., composed of several distinct companies or corporations, over which line, by an arrangement between such companies, cars loaded with freight were run from each terminus the whole length of such con-

Spears v. Lake Shore and Michigan Southern R. R. Co.

tinuous line. The said Buffalo and Erie Railroad Company was one of the companies forming such line.

4th. With the view and for the purpose of being used in the transportation of their own oil over the said line of connecting railroads, between Titusville and Boston, the plaintiffs provided and furnished tanks of their own, suitable for holding oil to be transported by railroad; and, by an arrangement made by and between the plaintiffs, and the Oil Creek Railroad Company, one of the railroad companies in said connecting line of roads, the said tanks were to be used in transporting oil from at or near Titusville to Boston, for the plaintiffs, and were placed on platform cars belonging to the said Oil Creek Railroad Company. The tanks were fastened to the cars, for safety, but were to be and remain the property of the plaintiffs, and when they ceased to be used, were to be delivered to the plaintiffs—the cars to be and remain the property of the said railroad company.

5th. Such tanks were on said cars, and used in the transportation of oil, for several months prior to the 11th day of November, 1867. Each tank had the capacity of 4,000 gallons, and two tanks were placed on each platform car. Prior to said last mentioned day, each car with tanks thereon filled with oil, belonging to the plaintiffs, was run between Titusville and Boston. After said tanks were emptied of their contents, at Boston, the cars, with the empty tanks thereon, were, by the same line, returned to Titusville, no other freight being loaded on the cars.

6th. The carriers furnished the plaintiffs with a bill of lading for each shipment of oil, in which the quantity of oil contained in the tanks was mentioned; but no mention was made of the tanks themselves, nor any statement made that the tanks were not embraced. And a price was fixed for each shipment of oil, &c.,

Spears v. Lake Shore and Michigan Southern R. R. Co.

from Titusville to Boston, according to the quantity thereof.

7th. No bill of lading was furnished on the return of the tanks from Boston to Titusville; nor was any consideration paid for the transportation of the tanks from Boston to Titusville, independent of that paid for the transportation of the oil from Titusville to Boston. It was not disclosed, on the trial, that any special arrangement was entered into between the parties as to the return transportation of the tanks from Boston to Titusville. After the tanks were placed on the cars as aforesaid, and up to the time two of them were destroyed, as hereafter mentioned, they were only used as above stated, in the transportation of oil of the plaintiffs, and were not at any time dismounted from the cars.

8th. On the 11th day of November, 1867, two of said tanks were, at Titusville, filled with oil owned by the plaintiffs, and shipped and consigned to them at Boston; and while being carried on the said cars, and while on that part of said continuous line of railroads owned, run, managed and operated by the said Buffalo and Erie Railroad Company, the said two tanks were, with their contents, without fault or negligence of the last named company, burned up and destroyed. The value of said two tanks was \$100 each. The loss happened soon after the said 11th day of November, 1867.

BARKER, J. At the time the plaintiff's property was destroyed, it was in the sole possession and under the exclusive management of the Buffalo and Erie Railroad Company. Its preservation and protection from damage was beyond the supervision of the plaintiffs, and was wholly confided to the oversight of the said company and its agents.

The liability of the company for the damages arising from the loss, is sought to be maintained upon the ground that the entrustment of the property was made

to the corporation, now represented by the defendant, as a common carrier of merchandise. Unless it is held that such was the real relation, as between the owners of the goods and the railroad company, the plaintiffs are without remedy, for no fault or negligence is imputed to it while in possession of the property.

A common carrier is a person who undertakes to transport from place to place, for hire, the goods and property of such persons as may see fit to employ him.

The general business of the Buffalo and Erie Railroad was that of a common carrier. If it was in fact, or in a legal sense, transporting for hire the property destroyed, then the case is established, in every particular, against the company.

In ascertaining the particular facts of the case, I am unable to find that a compensation was paid to the plaintiffs by the carriers forming the line, for the use of the tanks. I have regarded Mr. Spear's letter, read in evidence, under a stipulation, as recalling, and a correction of, his evidence, that leakage was paid by the companies to the plaintiffs. With this correction made, there is nothing upon which to base a finding that they were in any sense lessees of the tanks. Had such a relationship been established, it would have been wholly inconsistent with the idea that the railroads were transporting the tanks charged with the strict liability of common carriers, in case of loss.

The tanks were delivered by the owners to be used in the transportation of their own oil, and for no other purpose; they were constantly used in that business and none other. Such or similar packages were absolutely indispensable to secure safety as well as carriage. The mode of fastening to the cars was also a prudent act, if not a necessary one, to prevent injury to the tanks and loss of their contents. The way the fastening was done, and the constant use of the same on the same car, and the frequent trips made over the road,

Spears v. Lake Shore and Michigan Southern R. R. Co.

promptly suggests the inquiry, as to the real arrangement existing between the parties, concerning the use of the tanks. It is obvious that the mode of attachment, and the continuous use on and with the cars of the railroad, is not necessarily inconsistent with the relation of shipper and carrier.

I have reached the conclusion that the railroads, under the arrangement made, assumed as to the tanks the unrestricted liabilities of common carriers.

They received, in a legal sense, compensation for the service of carriage. True, the money paid over by the owners was in terms for carrying the contents of the tanks; but the tanks were packages in which the oil was contained. It would be a narrow view, and one detrimental to the public, to hold to the position of the defendant. A class of trade in the country, developed since the use of railroads, which secures quick trips and permits the repeated use of the same packages in many kinds of shipments, has led to the custom of returning the package by the same line, for the purpose of being refilled for another shipment. I think the customs of trade sanction the legal position—at least so far as this case is concerned—that the carrier received a compensation in a legal sense, in the payment of freight on the oil.

It is not unlike the rule, that a carrier of passengers is liable, as a common carrier of goods, for the ordinary baggage of the passenger, and the compensation for its carriage being, in the law, included in the passage money paid by the traveller. (*Orange County Bank v. Brown*, 9 *Wend.*, 115. *Camden &c. Co. v. Burke*, 13 *id.*, 628. *Hollister v. Nowlen*, 19 *id.*, 235.)

The defendant's liability must be held to be that of a common carrier, on the authority of *Mallory v. The Tioga Railroad* (13 *Barb.*, 488.) That case and this are alike in every essential particular. There, the cars were owned by the shippers, and were carried loaded

Mead v. Mercantile Mutual Insurance Company.

one way, and empty the other, over the road. The owner paid freight by the ton, one way, on the coal, the crates being fastened to platform cars. The cars, when loaded, were injured, on the carrier's road, while being transported by its motive power. The railroad company was held liable as a common carrier, for the injury to the cars. This adjudication I deem a binding authority, to be followed in the disposition of this case. It is not in conflict with any authority I can find, nor with any principle of law which has been brought to my attention.(a)

The plaintiffs are therefore entitled to recover of the defendant the value of the tanks, \$200, and interest from December 1, 1867, and costs.

Judgment accordingly.

[ERIE CIRCUIT AND SPECIAL TERM, December, 1876. *Barker*, Justice.]

(a) That case was *affirmed* by the Court of Appeals. See 32 *How Pr.*, 616.

MEAD vs. THE MERCANTILE MUTUAL INSURANCE
COMPANY.

The contract of insurance is a mere contract of indemnity to the assured, against such loss as he may actually sustain, by reason of any of the perils insured against.

Upon an abandonment and payment, or, in case of a partial loss, adjustment and payment, the underwriters are, in equity, entitled to subrogation to all the rights and causes of action which the insured has against other persons, on account of the loss.

The owner is the person who stands to the whole risk, and must suffer the whole loss; unless he engages another to bear it in the event of a loss.

When another engages to be at that risk for the owner, then the owner and the insurer, as to the ownership of the property and the risk incident to it, are in law considered as one person. Hence each is regarded as beneficially interested in any indemnity which can be exacted from others by reason of the loss.

So, when the owner has been paid his loss, in full, by his insurer, there is a

Mead v. Mercantile Mutual Insurance Company.

manifest equity in transferring to such insurer any right to indemnity which the owner holds for the common benefit of himself and the insurer.

When a shipper has provided himself with two sources of indemnity, in case the cargo is destroyed or injured during the transportation — one from the carrier, arising out of the operation of the law, the other from an insurance company by virtue of a contract of insurance — the liability of the carrier is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability.

The shipper may apply, in the first instance, to whichever of these parties he pleases. If he applies to the carrier, and receives entire indemnity, he has no right to call on the insurer. If he applies to the insurer, and receives his loss, he holds the claim against the carrier in trust for the benefit of the insurer.

A bill of lading does not suppose a policy of insurance, but a policy of insurance does presuppose that there is a liability on the part of the carrier.

N., L. & Co. being under a contract with the owner of a cargo of grain, to transport the same from Buffalo to New York, free from any damage that might happen from the perils of the trip; *held* that they had an insurable interest in the property; and that having caused the same to be insured, by a contract making the loss, if any, "payable to N., L. & Co., or order," such contract could not, by construction, or by the aid of parol proof, be enlarged in its operation so as to make it cover the risks of other insurers or persons interested.

THIS action was tried at the Erie county circuit, by and before Justice BARKER and a jury, in February, 1877.

Upon the direction of the court, a verdict was rendered for the plaintiff for the sum of \$142, that being the only sum claimed by the plaintiff. Upon receiving the verdict, the court, on its own motion, ordered the case to stand for further consideration. At a subsequent day, the counsel for the respective parties handed in written arguments.

Edwin Thayer, for the plaintiff.

George B. Hibbard, for the defendant.

BARKER, J. The case is this: Mr. Henry C. Winslow was the owner of eight thousand bushels of corn in store at Buffalo, which he desired to be transported to

Mead v. Mercantile Mutual Insurance Company.

another market—the city of New York. Nelson, Lotheridge & Co., also of Buffalo, commission merchants and forwarders, agreed to carry the same for the owner, at a fixed price per bushel, by the canal boat James A. Allen. The contract between these parties was reduced to writing, and took the form of an ordinary bill of lading, signed by both of these parties, in which the boat was named on which the corn was to be carried, and the consignees, the number of bushels in the cargo, rate &c., with the conditions of the carriage and bargain were fully and at large set forth. Nelson, Lotheridge & Co. were not the owners of the boat named; nor were they in command of her. The plaintiff in this action was owner and master of the boat, and procured Nelson, Lotheridge & Co., as his agents, to receive for him a cargo, they charging him a commission.

Upon receiving the cargo, the plaintiff, as owner and master of the boat, gave his bill of lading, in all essential particulars like the one issued by Nelson, Lotheridge & Co. to the owner; except that in this bill of lading it was stated that the shipment was “*by Nelson, Lotheridge & Co. as agents and forwarders.*” In the bill of lading firstly described, the shipment is stated to be by “*Henry C. Winslow,*” who was, as has been already stated, the owner of the grain.

The defendant, upon the application of Nelson, Lotheridge & Co., insured the cargo, they being mentioned as the parties insured.

While on her trip, the boat was injured, being run into by the negligence of another party, and a small loss happened to the cargo.

Each of the bills of lading contained this clause: “All damage caused by the boat or carrier, or deficiency in the cargo, from quantity as herein specified, to be paid by the carrier, and deducted from the freight.”

Upon the arrival of the boat in New York, the damages to the cargo were ascertained and deducted from

Mead v. Mercantile Mutual Insurance Company.

the carrier's freight, as stipulated in the bill of lading, and the balance adjusted and paid to the plaintiff, the owner and master of the boat. The assured, Nelson, Lotheridge & Co., transferred to the plaintiff all claims for loss against the defendant arising out of the contract of insurance; and the defendant neglecting and refusing to pay the same, this action was brought.

Upon the trial, the damages were agreed upon at \$142.

Against the plaintiff's right to recover from the defendant this loss, it is urged as a defence, that the plaintiff, as carrier, is the party primarily liable to the owner and shipper, for any loss that he has sustained. That the plaintiff having paid the entire loss to the shipper, he, as the party assured, after such payment, had no cause of action, on the contract of insurance, and therefore the plaintiff got nothing by the assignment from the insured. That the equitable doctrine of subrogation is justly applicable to the case, and being applied, will necessarily defeat a recovery.

To the case, as made upon the trial, the position is a complete legal defence, and should have been so held upon the trial, and the motion for a nonsuit sustained.

The contract of insurance is a mere contract of indemnity to the assured against such loss as he may actually sustain, by reason of any of the perils insured against. Upon an abandonment and payment, or, in case of a partial loss, adjustment and payment, in equity the underwriters are entitled to subrogation to all the rights and causes of action which the insured has against other persons, on account of the loss. The owner is the person who stands to the whole risk, and must suffer the whole loss; unless he engages another to bear it in the event of a loss. When another engages to be at that risk for the owner, then the owner and the insurer, as to the ownership of the property, and the risk incident to it, are in law considered as one person. Upon this idea, each is re-

Mead v. Mercantile Mutual Insurance Company.

garded as beneficially interested in any indemnity which can be exacted from others by reason of the loss. So when the owner has been paid his loss, in full, by his insurer, there is a manifest equity in transferring to such insurer any right to indemnity which the owner holds for the common benefit of himself and the insurer.

In the case before the court, the shipper had provided himself with two sources of indemnity, in case the cargo was destroyed or injured during the transportation—one from the carrier, arising out of the operation of the law, the other from the insurance company in *virtue* of its contract with it. The liability of the carrier is in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability.

The shipper may apply in the first instance to whichever of these parties he pleases. If to the carrier, as he has in fact, in this case, and received entire indemnity, he has no right to call on the insurer. If he applies to the insurer and receives his loss, he holds the claim against the carrier in trust for the benefit of the insurer.

The carrier stands in no privity with the assured as to the contract of insurance; while the underwriters are in privity with the assured as to the bill of lading.

The bill of lading does not suppose a policy of insurance, but a policy of insurance does presuppose that there is a liability on the part of the carrier. (*The Atlantic Ins. Co. v. Storrow*, 5 Paige, 285. *Hart v. The Western R. R. Co.*, 13 Metcalf, 99. *Hall & Long v. Railroad Companies*, 13 Wallace, 367.)

The plaintiff does not really controvert these well established principles, but seeks to avoid their application to the case now in hand, on the ground that the facts make a case exceptional to the general rule of the right to subrogation.

But the plaintiff's rights must be determined in the

Mead v. Mercantile Mutual Insurance Company.

case as made, and as appears on the face of the contract of insurance and the bills of lading; for the plaintiff's offer to prove that the insurance was made for the benefit of the carrier, and that he furnished the money to pay the insurer, and that Nelson, Lotheridge & Co. were his agents in effecting the insurance, was overruled, on the defendant's making an objection to such proof. Of course, the correctness of such ruling is not now directly up. Nevertheless, I have considered it, as there must be a new trial; when the point will again arise.

The plaintiff stands on the ground that the entire contract of insurance is expressed on the face of the certificate read in evidence. That it was a consummated agreement in fact. It was so held on the trial, and is so treated here; as I have reached the conclusion to grant a new trial on other grounds. It is a contract in terms between the owner and Nelson, Lotheridge & Co. The latter, being under an agreement with the owner of the cargo to transport the same to New York, free from damage that might happen from the perils of the trip, they had an insurable interest in the property. By no rule of law with which I am familiar can the terms of this contract be enlarged, by parol proof, so as to make it cover the risks of other insurers. The insurance company has a right to an interpretation of the contract as it is written, and to stand by it as the parties thereto made it. There are no words used, or phrases adopted, that by usage and custom can be taken as indicating an intention by either party to cover the risks of other persons interested in the preservation of the property. Here the contract in terms states that Nelson, Lotheridge & Co. have insured the cargo, and in case of loss, the same "*is payable to Nelson, Lotheridge & Co. or order hereon.*"

If by construction, or by the aid of parol proof, this contract can be enlarged in its operation, then it is diffi-

Mead v. Mercantile Mutual Insurance Company.

cult to see how an insurer can limit his liability to an indemnity of one of the persons interested in the thing insured.

Upon an examination of the cases, bearing upon this question, it will be found that all of them hold that where it appears upon the face of the policy, by a fair interpretation, that there was an intention to insure the owner, then extrinsic evidence may be given to show who such owner is, and the nature and extent of his interest. But when it appears, on the face of the contract, that none other than the person named as the party assured was intended, then it is limited in its effect and operation; and should it, upon an inquiry, turn out that the party sought to be assured has no interest in the property described, it will be held void, as a wager policy. (*Angell on Insurance*, §§ 79, 80, 81, 82. *DeBolle v. Pennsylvania Ins. Co.*, 4 *Wharton*, 68. *Mellenberger v. Beacon*, 9 *Barr (Pa.)*, 198. *Routh v. Thompson*, 13 *East*, 274; *S. C.*, 11 *id.*, 428. *Stilwell v. Staples*, 19 *N. Y.*, 401. *Waring v. Indemnity Ins. Co.*, 45 *id.*, 606.)

In instances where the property is described as "held in trust," "on commission," and in kindred terms, in a policy running to an agent, factor or the like, it is held an action is given to the owner, and he has a right to take the place of the insured; he may adopt the contract and enforce it for his own benefit. But in all such cases, there is a general clause, as to the nature of the interest insured.

The other questions discussed seem to be hinged upon those already considered, and dependent upon them; and I have not thought it necessary to examine them.

A new trial is granted, with \$10 costs, to abide the event.

New trial granted.

[ERIE CIRCUIT AND SPECIAL TERM, February, 1877. *Barker*, Justice.]

READ, as administrator, &c., *vs.* THE CITY OF
BUFFALO.

An instrument signed by the mayor and clerk, and countersigned by the comptroller of a city, addressed to the treasurer, directing the payment to A. or order, of a specified sum "out of local fund, when collected or realized from tax sales, for completing the grading of H. street," &c., is not a bill of exchange, nor a check; but is, in legal effect, a non-negotiable promissory note.

An action can be maintained upon it, to recover the sum mentioned therein, on an implied promise to pay the debt stated to be due and owing to the payee named therein.

No demand is necessary, as a condition precedent to maintaining an action upon such an instrument.

The order being made payable at a particular place, and upon the happening of a particular event, when the fund out of which it is to be paid has been collected and realized by the city, the debt is due and payable, by the very terms of the contract.

Such orders are not affected by a statute passed after they were given; unless it appears that the legislature intended to change the meaning and effect of outstanding contracts.

A notice, published in the city paper, that the city is in funds to pay its orders of a particular series, not brought to the knowledge of a holder before the making of his demand, is not sufficient to effect a suspension of interest upon an order.

Even though the city was ready and willing to pay such an order, at the time and place of payment, it is in no attitude to defeat a recovery of the face of the order and interest down to the day of trial, if it has not brought the money into court for the plaintiff.

ACTION tried at the Erie circuit, in February, 1877,
before Justice BARKER, without a jury.

O. O. Cottle, for the plaintiff.

John B. Green, (city attorney,) for the defendant.

BARKER, J. One of the orders in suit reads as follows, viz.:

Read v. City of Buffalo.

"Counterigned
R. D. FORD, Comptroller."

"\$45.79 Buffalo, June 9, 1870.

Treasurer of the city of Buffalo,

Pay to the order of James Love, forty-five $\frac{7}{10}$ dollars, out of local fund, when collected or realized from tax sales, for completing the grading of Hudson st., bet. 12th and Wadsworth st.

ALEX. BRUSH, Mayor.

W. P. WINSHIP, Dep. City Clerk."

This instrument is not a bill of exchange, nor a check. The drawer and the drawee are the agents of the city of Buffalo; both act in their official capacity, in drawing the same, neither intending to charge himself personally by the transaction. Therefore the drawer and drawee are, in a strict sense, the same party. Upon its face it purports to be drawn for value, on account of and for work and labor done for the city. In law an action can be maintained thereon, to recover the sum mentioned therein, on an implied promise to pay the debt stated to be due and owing to the payee named. Whenever there is a debt due from one person to another, and such obligation is acknowledged in an instrument in writing executed by the debtor, in due form of law, the creditor can count upon such instrument as the basis of his right of action.

Such orders are held to be, in legal effect, non-negotiable promissory notes. (*Fairchild v. Ogdensburgh &c. R. R. Co.*, 15 N. Y., 338. *Bull v. Sims*, 23 id., 570. *Oatman v. Taylor*, 29 id., 657. *Kelley v. Mayor of Brooklyn*, 4 Hill, 263. *Smith v. Cheshire*, 13 Gray, 318. *Dillon on Municipal Corp.*, § 406.) The order was made payable at a particular place, and upon the happening of a particular event. The fund out of which it was to be paid has been collected and realized by the city; therefore the debt is due and payable by the very terms of the contract.

The defendant seeks to prevent a recovery and to se-

Read v. City of Buffalo.

cure a dismissal of the plaintiff's complaint, upon the ground that no proper demand of payment was made by the holder of the order, on the city treasurer, before the commencement of the suit. By the evidence it is established that he did make a demand before the suit was brought; but he demanded, as the defendant insists, more than was due on the instrument, and therefore the holder is in the same situation as if he never had made a demand.

Before considering the question, whether he demanded more than was due, it will be determined whether any demand at all was necessary, as a condition precedent to maintaining the action. It has long been decided by the courts in this state, that no such demand is required before suit can be brought on the instrument and recovery had for the debt promised to be paid.

Where a promissory note is made payable at a particular place, it, as against the maker, binds him to pay the same "generally and universally;" that is, he can be required to pay at all places wherever he can be found; and the commencement of the suit is always treated as a proper and sufficient demand. The same rule applies, also, in all respects, to a bill of exchange, made payable at a particular place, or accepted payable at a designated place.

The rule as thus stated, has been uniformly adhered to in this state, since judgment was pronounced in *Wolcott v. Van Santvoord*, reported in 17 *John.*, 248. See also *Fenton v. Goundry*, (13 *East*, 459,) among the leading English cases, and the following in our own courts: *Caldwell v. Cassidy*, (8 *Cowen*, 271;) *Green v. Goings*, (7 *Barb.*, 652;) *Fairchild v. Ogdensburgh &c. R. R. Co.*, (15 *N. Y.*, 338.) But it is urged that this is an unjust and harsh rule to apply to fix the maker of the note and acceptor of a bill, who has made his promise to pay at a particular place, and has attended there on the day named with the money to meet his engagement

and pay his debt—that he should be liable to a suit, before the holder of the paper comes and asks for his pay. This would be so, were it not for another rule, intended to protect such parties. It is this: if the maker of the note or the acceptor of the bill, be at the place of payment, with the funds, and ready to pay on the day of payment, he can, when sued, bring the money into court and plead his readiness to pay at the time and place of payment, in bar of damages arising from non-payment, but not in bar of a recovery for the debt due on the day named for payment. In such a case the creditor recovers no interest after the day of payment has passed, nor costs of suit; but the debtor has costs, in such a case. (*See cases before cited.*)

To make a practicable application of these propositions to this case; conceding the defendant was ready and willing to pay this order, at the time and place of payment, it is in no attitude to defeat a recovery of the face of the order and interest down to the day of trial, for the reason that it has not brought the money into court for the plaintiff.

The time of payment in this order was uncertain; it was drawn in the form, and upon the conditions named, to enable the defendant to be certain of funds, to be derived from a particular source, before its creditor could urge payment; and it is unreasonable to hold that the holder of such paper shall comply with all the rules applicable to strictly commercial paper. It appears that the city was in funds applicable to the payment of this order as early as the 15th of August, 1872. The plaintiff applied for payment some considerable time thereafter, and demanded interest up to that time. The treasurer refused to pay interest down to that day, but offered to pay the face of the order and interest to the said 15th of August, 1872. This the plaintiff manifested his unwillingness to accept.

The city had given a previous notice, in the city
VOL. LXVII.

Read v. City of Buffalo.

paper, that it was in funds to pay orders of this series, but it does not appear that such notice ever came to the knowledge of the plaintiff, before he made the demand. Such notice cannot be regarded as sufficient as a notification that the city was in funds applicable to the payment of the order, and to effect the suspension of interest. It would be most unreasonable to uphold any such proposition.

The defendant, with a view of diminishing the recovery, insists that the city had the power to terminate the accruing of interest on these orders after the treasurer was in funds to pay them, on complying with the provision of the present charter bearing on that question, viz.: "The treasurer may at any time, when he shall have money in his hands applicable to the payment of such warrants, give notice in the official papers that he will pay all or any portion of such warrants, with accrued interest, on a day to be specified in said notice, and the interest upon such warrants shall cease from and after the day specified in such notice." Such a notice as is required by this provision of the statute was published in the city paper, and a day named for the payment of the orders was the one already stated, to wit, August 15, 1872.

The charter in force when the orders in suit were given contained no such provision, nor any of similar import. This regulation first appears in the charter of 1872. (*Title 6, sec. 22.*) It is very clear that this provision was intended to apply only to future orders and warrants. The scheme for assessing and collecting taxes for local improvements was, by this charter, very much changed, conferring upon the city additional powers, and making local assessments payable in a different manner, and requiring warrants issued in payment of the work and labor to take a particular form, and be payable on particular days, and giving the city

Monell v. Northern Central Railroad Co.

the right to pay them before the day named therein for payment.

Orders or warrants issued under the charter as amended would be, beyond all doubt, subject to these special provisions, and they be regarded as incorporated into the agreement, and the holders bound to comply with them, and with the action of the city authorities acting in obedience to the charter.

The general rule of construction is, that statutes, in their effect, shall be prospective only ; unless it appears that the legislature intended that it should have a retrospective operation. The reading of the section entire, from which the above quotation is copied out, does not suggest to my mind that the legislature intended to change the meaning and effect of outstanding contracts.

It follows, from these views, that the plaintiff is entitled to recover the face of the order, and interest thereon up to the time of trial.

The other orders in suit are similar in all respects to the one set forth, and are embraced in the decision.

Judgment for the plaintiff.

[ERIE CIRCUIT AND SPECIAL TERM, February, 1877. *Barker*, Justice.]

HENRY MONELL *vs.* THE NORTHERN CENTRAL RAILROAD COMPANY.

Where a contract is made, by a shipper of goods, with one of several connecting railroad companies forming a continuous line of carriers between the place of shipment and the place of delivery, for the transportation of goods and delivery thereof at the place of destination, the service performed by the other companies in the line is deemed to be done by, and at the request of the contracting company, and as its agents.

The acts and management of such connecting roads are, in law, the doings of the contracting company; and if they are such as to work a breach of the

Monell v. Northern Central Railroad Co.

contract for transportation, the shipper has a right of action therefor, against the contracting company.

When the contract of a carrier is silent in respect to the time of delivery, the law requires him to use due diligence. The want of due diligence is the ground of the carrier's liability.

What is sufficient evidence to be submitted to the jury, upon the question of due diligence in delivering perishable property.

The defendant, a common carrier of goods for hire, contracted to transport a quantity of potatoes from Batavia, N. Y., to the city of Philadelphia. The potatoes were in good order, when shipped. The cars containing them arrived at G., a place within three miles of the place of delivery, within the usual time, but were left on the tracks at G. for at least fourteen days, before being taken to the city; and during that period the potatoes were frozen. It appeared that the company employed by the defendant to aid in the transportation and delivery of this freight had no warerooms in Philadelphia for storing freight temporarily, with a view to hasten and facilitate delivery; and that there was, at the time, a great accumulation of freight, both at that place and at G. *Held*, that upon the evidence, it was a fair question for the jury to say whether or not due diligence was used by the defendant, in delivering the freight; and that the judge properly refused to take the case from the jury by granting a nonsuit, or ordering a verdict for the defendant.

Held, also, that if the potatoes were frozen at G., after a reasonable time for delivery had elapsed, the defendant was chargeable with the loss. That nothing short of a calamity would justify the holding of the cars at G. for so long a time.

Receipts for freight, given by a consignee to the carrier, stating the goods to be in good order, are evidence in favor of the latter that the freight was delivered in good order. But, as between the parties, they are not conclusive on the question.

When it appears that the carrier demanded that the receipts should be put in that form, as a condition to the delivery of the goods; and that the receipts were signed under a protest that the goods were not in good order; it is a fair question of fact for the jury, on the evidence, and cannot be disposed of in favor of the carrier, as a question of law.

ON the trial, a verdict was rendered for the plaintiff, and the defendant moved for a new trial on a case containing exceptions.

John Hubbell, for the defendant.

George Bowen, for the plaintiff.

Monell v. Northern Central Railroad Co.

BARKER, J. It is admitted by the pleadings that the defendant is a common carrier of goods for hire, between the village of Batavia, N. Y., and the city of Philadelphia, Pa.; and that it received the goods in question for transportation from Batavia to Philadelphia. It is also admitted that the defendant is a foreign corporation, created by and under the laws of Pennsylvania.

The case does not disclose what part of the connecting line of railroads, between the places mentioned, is owned and managed by the defendant. It is not at all important to know, in the determination of the plaintiff's rights and the defendant's obligations under the contract admitted; as the contract was entire, to deliver the goods at the place of destination. The service performed by the other and connecting roads was done by and at the request of the defendant, and as its agents. They simply aided the defendant to perform its agreement. The acts and management of such roads were in law the doings of the defendant; and if they were such as worked a breach of the defendant's contract, it gives the plaintiff a right of action for the damages he has sustained. (*Manhattan Oil Co. v. Camden & Amboy R. R. & Co.*, 54 N. Y., 197.)

The rights, franchises and privileges conferred on the defendant by the law of its creation are not disclosed, and it will therefore be presumed, as against the corporation itself, that the act gave it full power and authority to make the contract it did with the plaintiff.

The chief question in the case is this: Was it fairly proved, on the trial, that the defendant failed to perform its contract, in not making a timely delivery of the goods, and that in consequence of the delay the property was injured by frost?

In respect to the time of delivery, when the contract is silent on the subject, the law requires the carrier to use due diligence, in the performance of his agreement

Monell v. Northern Central Railroad Co.

in this respect. The want of due diligence is the ground of the carrier's liability. (2 *Parsons on Contracts*, 185. *Parsons v. Hardy* 14 *Wend.*, 217. *Wibert v. New York & Erie R. R. Co.*, 12 *N. Y.*, 245. *Condict v. Grand Trunk R. R. Co.*, 54 *id.*, 505.)

I am well satisfied that sufficient evidence was given, on the trial, to make a case for the jury to say whether due diligence had been used, or not, in the delivery of the property; and that the court properly refused to take the case from the jury, by granting a nonsuit, or ordering a verdict for the defendant, as was requested on the trial.

The place in the city of Philadelphia where property of this character, transported by the defendant, was delivered to the consignees, was at the Reed street depot. The cars in which the potatoes were shipped, arrived at Greenwich Point, a place three miles from the Reed street depot, within three or four days after they started from Batavia, and within the usual time for making the trip. These cars were left on the tracks at Greenwich Point, for the period of at least fourteen days. It appears that at Greenwich Point, the Pennsylvania Rail Road Company has yards and tracks, where cars with freight for city delivery come to rest until they can be run up to the depot, for a discharge of freight.

It would seem as if this circumstance, alone, was sufficient proof to put the defendant to its excuse for the delay; that nothing short of a calamity could justify the holding of these cars at this place for so long a time. The goods had reached their destination, and nothing short of a want of the usual and proper facilities for the delivery could delay the same for so many days.

The excuse presented for this prolonged delay is, that the accumulation of cars at Greenwich station was unusually large, and that they were brought up to the Reed street depot as fast as they could be unloaded and the freight delivered to the consignees. The plaintiff's con-

Monell v. North Central Railroad Co.

signee, who was on the ground from the time the cars arrived at Greenwich Point, says he at once called for the goods, and that he was ready, with men and teams, to receive them; that he informed the employés of the company that the cars were at Greenwich Point; and that day after day promises were made to bring up the cars containing the potatoes.

The defendant called two witnesses to prove the mode and manner of doing the business of this character, at Philadelphia, and the causes that led to the delay in unloading these cars. These witnesses were connected with railroads, and, with others, had the charge and management of the business at these points. One of them says: "In November and December of last year, there was an accumulation of cars at the Greenwich station, caused by the potatoe merchants not unloading directly (precisely) at the railroad wharf. The cars were accumulating at Greenwich by reason of a great accumulation of cars at the Reed street station. * * * The course of business between our company and the consignees was to have the cars come up from Greenwich as fast as we had facilities for discharging them." "I can't say exactly how many car loads of potatoes we discharged during the month of December that year, or from the first to the twentieth of December, which would cover all this ground; it was a large number; we had, I suppose, a thousand cars, possibly eleven hundred, a good many every day, and these cars had all been detained at Greenwich and sent up to the station, and discharged as fast as we could. The only reason I can assign why the cars spoken of by Mr. Blizard (the cars in question) were not taken to the Reed street wharf earlier was, that the market was so glutted that the consignees and receivers could not get up the cars. I don't think that the cars were held at Greenwich any length of time. The facilities were all occupied with cars

loaded with potatoes; these cars could not be sent up faster than they were."

It also appeared that the railroad did not deliver goods at Greenwich; and at the Reed street wharf it had no warerooms, and delivered goods from the cars standing on the track, and consignees were permitted to sell and deliver the potatoes from the cars by the measure, and in small quantities.

One other witness for the defendant testified, "that the capacities in forwarding these potatoes, cars and their capacities, at Reed street, were sufficient to unload them, if the merchants could have sold them for better prices. The tracks not having sufficient capacity they allowed them to accumulate at Greenwich, and if the merchants would unload them in any reasonable time, within the twenty hours specified, but in two or three days they would bring them up. But they failed to do it, and consequently the company were compelled to leave them at Greenwich for want of capacity at Reed street wharf."

Upon all the evidence presented, it was a fair question for the jury to say, whether or not due diligence was used by the defendant in delivering the freight. After freight is received by the carrier and forwarded, the owner has the right to anticipate its arrival at its destination within the usual and customary time; and to effect this the carrier must exert all reasonable effort to accomplish it. If unforeseen difficulties are encountered, prompt and resolute action, fairly commensurate to the cause of delay, must be resorted to to end the hindrance; otherwise the charge of negligence and want of due diligence is maintained.

Here it appears that the company employed by the defendant, and paid for the transportation and delivery of this freight, had no warerooms in Philadelphia for storing freight temporarily, with a view to hasten and facilitate delivery. That another cause of delay was,

Monell v. Northern Central Railroad Co.

that consignees were tardy in unloading cars; and in some instances were permitted to make sales and delivery from the cars, to their own customers, an unusual practice.

It cannot be successfully maintained, in my opinion, that when goods have been detained for delivery fourteen days after their arrival at the place of destination, and no other excuse presented than such as appears in this evidence, it is purely a question of law, and that the court should hold that due diligence has been used.

The charge of the court to the jury is not set forth in the case, and it must be presumed that the rule of law was correctly stated, and properly illustrated.

The evidence showed that the potatoes were in good order when delivered to the carrier; and it also tended to prove that before they were delivered to the consignees, and while at Greenpoint, they were frozen. If frozen at Greenpoint, after a reasonable time had elapsed within which to deliver them, the defendant was chargeable with the loss. (*Michaels v. The New York Cen. R. R. Co.*, 30 N. Y., 564.)

The receipts given by the consignees were evidence in favor of the defendant that the potatoes were delivered in good order. But, as between the parties, they were not conclusive, on the question. The plaintiff claims that the defendant demanded that the receipt should be put in this form as a condition to the delivery of the goods; that when the receipts were signed and delivered, a protest was made that the goods were not in fact in good order. Upon the evidence, it was a fair question for the jury, and could not be disposed of in favor of the defendant, as a question of law.

One of the consignees of the goods, Mr. Blizzard, was called and examined as a witness for the plaintiff, and testified as to the time of the delivery, and as to the form of the receipt required by the railroad company; and, among others, this question was propounded to him:

Tierney v. N. Y. Central and Hudson River R. R. Co.

"In reference to these receipts, I will ask you, could you have got this freight, at all, without having signed these receipts?" This question was objected to, by the defendant's counsel, as inadmissible and incompetent. The court overruled the objection, and the question was sustained, and the defendant excepted.

If this question was intended as an inquiry made of the witness if the company demanded the receipt as a condition of the delivery, then it was proper, as it was an inquiry concerning a fact. If it was an inquiry for the opinion of the witness whether the company would have delivered the goods if he had not signed the receipt, it would doubtless be an incompetent question. But the evidence of the witness, which follows this question and the rulings thereon, does not appear to be responsive to the inquiry, and is a mere statement of the facts pertinent to the issues. So no injury has followed the ruling of the court; whatever may be said as to the form of the question.

The motion for a nonsuit is denied, with costs.

[GENESEE SPECIAL TERM, March, 1877. *Barker*, Justice.]

PATRICK TIERNEY vs. THE NEW YORK CENTRAL AND HUDSON RIVER RAIL ROAD COMPANY.

Where the property delivered to a carrier for transportation is of a character recognized among carriers and forwarders as *perishable*, it requires particular attention, and a greater degree of care than attaches to such as is deemed non-perishable.

A quantity of cabbages were received from the plaintiff, by the defendant, at East Albany, for transportation to New York, on the 6th and 7th of January. They were in the car, ready for the freight train, at 10.40 p.m.; from which place freight trains were accustomed to leave for New York every few hours, the running time being, ordinarily, about eleven hours. The car was left at East Albany a considerable time, although several other trains

Tierney v. N. Y. Central and Hudson River R. R. Co.

were sent over the road in the meantime; and it did not reach New York until the 10th or 13th of January; when the cabbages were frozen, and nearly destroyed. *Held*, that the judge properly instructed the jury that the property having been delivered to, and accepted by, the defendant as perishable, it became its duty to forward it by the first train; unless there was such a pressure and accumulation of freight of a similar kind, which had previously arrived, as to prevent such immediate action.

Held, also, that if there had been no accumulation of freight for transportation, beyond the ordinary capacity of the road, all of it should have been forwarded in the order of its arrival; but if any delays were necessary, by reason of unusual accumulation, the perishable property should be forwarded, in preference to that which was non-perishable.

Held, further, that whether the plaintiff should have guarded the property by other means than those employed, was a subject for the consideration of the jury, holding in mind the character of the property; the state of the weather; the condition of the car in which the property was to be forwarded; the distance from its destination; and the usages of prudent men under like circumstances.

Also *held*, that the plaintiff took all risks of injury to the property from frost, which would have happened had it been forwarded immediately; and the defendant was to be held liable only for such damage as was occasioned by frost, as the result of inexcusable delay.

The plaintiff signed a receipt for the property, in New York, as "in good order." *Held*, that it was competent for him to show the circumstances under which this receipt was given; and that he might prove that he wanted to sign a receipt for the load as "in poor condition," but was not allowed to do so.

That he was not concluded by the terms of the receipt. That it was not of binding force as a contract; that, at most, it was but an admission, and therefore susceptible of explanation and correction by parol evidence.

Held, also, that evidence of what the plaintiff could have obtained in the public market, for the cabbages, on the morning of their arrival in New York, was evidence bearing on the question of value, and therefore admissible on that question.

APPEAL from an order denying a motion, made upon the minutes, for a new trial; and motion for a new trial on exceptions taken at the trial and ordered to be heard at a General Term in the first instance.

The action was to recover damages arising from the negligence of the defendant as a common carrier, in transporting a quantity of cabbages from Albany to New York, in consequence of which negligence the cab-

Tierney v. N. Y. Central and Hudson River R. R. Co.

bages became frozen. The plaintiff recovered a verdict. (*S. C.*, briefly reported, 10 *Hun*, 569.)

A. J. Colvin, for the plaintiff.

Matthew Hale, for the defendant.

BOCKES, J. It is quite plain, I think, that a case was made for the jury, on the evidence submitted. The property delivered for transportation was of a character recognized among carriers and forwarders, as perishable; hence required particular attention, and a greater degree of care than would attach to such as is deemed non-perishable. It was received on the 6th and 7th of January; and due and proper diligence required that it should have been at once forwarded to the city of New York, its place of destination. It was in the car, ready for the freight train at East Albany at 10.40 p.m.; from which place those trains were accustomed to leave for New York every few hours. The running time being, ordinarily, about eleven hours. The car was left at East Albany for a considerable time, notwithstanding several trains were sent over the road, and did not reach New York until the 10th, and as the plaintiff testified, until the 13th of January. In the meantime the property was frozen, and nearly destroyed. The defendant endeavored to explain and excuse the delay, by showing an accumulation of freight at East Albany; but the evidence in support of this hypothesis was inconclusive to an extent, certainly, which made it proper to submit the case to the jury, on the proof. The learned judge properly held, and instructed the jury that inasmuch as the property had been delivered to, and accepted by, the company as perishable, it became its duty to forward it by the first train, unless there was such a pressure and accumulation of a similar kind of freight to be transported, and which had previously arrived, as to

Tierney v. N. Y. Central and Hudson River R. R. Co.

prevent such immediate action. This instruction to the jury was sound in law. The rule laid down was a reasonable and fair one. It imposed no unjust obligation upon the defendant. If then there had been no accumulation of freight for transportation beyond the ordinary capacity of the road, all of it should have been forwarded in the order of its arrival ; but if any delays were necessary, by reason of unusual accumulation, the perishable property should be forwarded in preference to that which was non-perishable. So the judge was right in holding that the defendant was bound to forward the car containing the plaintiff's perishable property, in case there was a pressure of freight cars to be forwarded, in preference to those which contained non-perishable property.

It is urged that the plaintiff was negligent in omitting to protect the property from frost ; but this question was also for the jury, it not being shown, indisputably, that he omitted the usual and proper precautions. Whether he should have guarded the property by other means than those employed, was a subject for the consideration of the jury, holding in mind the character of the property ; the state of the weather ; the condition of the car in which it was to be forwarded ; the distance from destination ; and the usages of prudent men under like circumstances. But I think the defendant has no possible cause of complaint as to the manner in which the case was given over to the jury on this branch of it ; for the court held that the plaintiff could make no claim for any injury resulting from the freezing of the property, had it been forwarded immediately after it was delivered for transportation—or more precisely, if forwarded and delivered at its destination with due diligence. The jury were instructed with precision and distinctness, that the plaintiff took all risks of injury to the property from frost, which would have happened to it, had it been immediately forwarded ; and that the de-

Tierney v. N. Y. Central and Hudson River R. R. Co.

fendant was to be held only for such damage as was occasioned by frost, as the result of inexcusable delay.

It appeared in evidence that a placard, giving notice that the car contained perishable property, and that it must be run through to New York by the first train, was attached to it when loaded; and an employé of the company stated to the plaintiff at the time of loading, that the car would be in New York the next morning. This statement was admitted in evidence, against objection; and the court was requested to charge the jury that neither the placard, nor such statement, constituted any part of the contract for transportation. The court charged as requested; but held, in substance and effect, that both might be considered by the jury in determining the question of defendant's liability. In this there was no error. The placard and statement evidenced no additional obligation or duty, beyond that imposed by the contract for transportation. It was competent to prove that such a placard was attached to the car. And as regards the statement by the defendant's employé, that was innoxious, as all the evidence in the case went to show, and did show, indisputably, that the car, if despatched according to the understanding and intention of the parties, and barring accidents, would arrive in New York the following morning. The evidence objected to, with all the significance given it under the remarks of the court, could not have worked an injury to the defendant's rights.

The plaintiff signed a receipt for the property in New York as "in good order." It was competent for the plaintiff to show the circumstances under which this receipt was given; and on this point he testified that he wanted to sign for the load "in poor condition," but was not allowed to do so. The court held that he was not concluded by the terms of the receipt. In this there was no error. The receipt was not of binding force as a contract; but at most was but an admission; and there-

Tierney v. N. Y. Central and Hudson River R. R. Co.

fore susceptible of explanation and correction by parol evidence. (*Ellis v. Willard*, 9 N. Y., 529.) The plaintiff was allowed to testify, against objection, that he contracted for a sale of the cabbages at Washington market, in New York, on the morning of the 8th January, at from sixteen to twenty dollars a hundred. He also testified that he had dealt in the property and was acquainted with its market value; that the men with whom he contracted were regular dealers at that market, which was the greatest produce market in New York; and further, that cabbages were worth from sixteen to twenty-five dollars a hundred, according to their quality. What he could obtain from dealers for the cabbages in that public market was evidence bearing on the question of value. This was admissible on that question. Certainly it was not hurtful in view of the other evidence as to value which stood wholly undisputed in the case.

The question of amount of damages was for the jury, on the proof; and the verdict is not without sufficient evidence to give it vindication. It cannot be said to be against evidence, nor against the weight of evidence.

Other questions, besides those above considered, were discussed on the argument, but as is believed, none of them require particular comment.

The order appealed from should be affirmed; and the plaintiff is entitled to judgment on the verdict, with costs.

Judgment accordingly.

LEARNED, P. J., and BOARDMAN, J., concurred.

[THIRD DEPARTMENT, GENERAL TERM at Elmira, May, 1877. *Leonard, Bockes and Boardman*, Justices.]

NANCY VAN ARNAM *vs.* ALEXANDER AYERS.

An action cannot be maintained by a married woman against a defendant for having, by his wrongful acts, advice and persuasion, induced her husband to abandon and become separate from her, whereby she is deprived of his society, support, maintenance and help.

At common law, a wife could not maintain such an action. And where the facts set forth in the complaint do not bring the case within either of the classes enumerated in § 114 of the Code, and § 7 of the act of 1862, (chap. 172,) the provisions of those statutes cannot be held to give her any right to maintain an action for the matters alleged in such complaint.

The common law rule still remains in force, except as it has been changed by § 114 of the Code and the act of 1862; and if the wife is interested in a cause of action not provided for by those acts, she must join her husband as a party.

DEMURRER to the complaint, assigning the following causes of demurrer; (1.) That the plaintiff has not legal capacity to sue; (2.) That there is a defect of parties plaintiff; (3.) That the complaint does not state facts sufficient to constitute a cause of action.

The complaint states: 1. That the plaintiff is the wife of James Van Arnam. 2. That on the 15th of June, 1874, the defendant, contriving and intending to injure the plaintiff, and to deprive her of the society, help and maintenance of her said husband, and to facilitate and to cause to be continued a meretricious intercourse and cohabitation which the said defendant well knew was existing between the said husband and one Alethea Wood, did with his hand and with instruments, perform two several operations upon the said Alethea for the purpose, by said operations, of procuring an abortion upon the said Alethea Wood, and by such means did procure such abortion. That the said abortion was produced by the defendant with full knowledge that the pregnancy of said Alethea was the result of an unlawful and meretricious intercourse between the said Alethea and the husband of the plaintiff; and the defendant then and there procured such abortion with the intent to facilitate an after intercourse between the said Alethea and

Van Arnam v. Ayers.

the husband of the plaintiff, and with the intent to injure the plaintiff, by estranging her said husband from the plaintiff and depriving the plaintiff of her husband's society, support and help. That the result of such operation was as contrived and intended by said defendant; and that the intercourse and cohabitation herein-after mentioned was kept up and continued between the husband of the plaintiff and the said Alethea. And that the husband of the plaintiff was, by the said wrongful acts and *by the persuasion* of the defendant, become and was entirely separated from the plaintiff, who from that time has been, and now is, deprived of the society, support, maintenance and help of her said husband. That by reason of the wrongful acts of the defendant, the plaintiff has been damaged to the amount of five thousand dollars.

H. C. Hall, for the plaintiff.

Mills & Palmer, for the defendant.

HARDIN, J. This case is novel. The learned counsel have cited no authority which reveals such a state of facts; and I have not been able to find a case like it in the books.

If the action was by the husband, against the defendant, for having persuaded, advised and induced the wife to leave and abandon her husband, there would be found cases to support it. (*Addison on Torts*, vol. 1, p. 9, and cases cited. *Winsmore v. Greenbank*, *Willes' Rep.*, 577, decided in 1745. *Hutcheson v. Peck*, 5 *John.*, 196. *Barnes v. Allen*, 1 *Keyes*, 390, 394. *Hermance v. James*, 32 *How.*, 143; *S. C.*, 47 *Barb.*, 124. *Bennett v. Smith*, 21 *Barb.*, 439.)

The husband, at common law, was entitled to the services of the wife, to the comfort of her society, and any wrongful interference gave him a right of action. He

Van Arnam v. Ayers.

might have an action for *criminal conversation*, for abduction, for enticing or harboring her. She was not supposed capable of consent, in either of those cases; and the husband's right of recovery rested, very much, upon the same ground of the master's right to recover for wrongs done to his servant.

But such was not the rule in respect to the wife. She had no such cause of action. Nor did the child have any similar right of action for a like wrong done to a parent or master. Sir *Wm. Blackstone* states the rule thus: "We may observe that in these relative injuries notice is *only taken* of the wrong done to the *superior* of the parties related by the breach and dissolution of either the relation itself, or at least the advantage arising therefrom; while the loss of the *inferior* by such injuries is *totally unregarded*. One reason for which may be thus; that the inferior hath *no kind of property* in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything, during her coverture. The child hath no property in his father or guardian, as they have in him for the sake of giving him education and nurture." (2 *Black. Com.*, *Chit. ed.*, p. 115; *marg. p.* 142, 143.)

In *Ball v. Bullard*, (52 *Barb.*, 143,) POTTER, J., says: "By the theory of the common law from time whereof the memory of man runneth not to the contrary, husband and wife are one person; that is, the very being or legal existence of the woman is suspended, or at least incorporated and consolidated into that of the husband, during the marriage. For this reason it was that this union of persons, or rather of merging the separate legal existence of the wife into that of the husband, *made* it necessary that the name of the husband should be used

Van Arnam v. Ayers.

in all actions in which the rights of the wife were brought into question in the courts."

The plaintiff does not, by the facts stated in the complaint, appear (1,) to have had any property in the services or society of her husband ; (2,) to have suffered any injury to her person ; or (3,) to her character, and therefore she does not state a cause of action.

I am aware that our statutes in relation to married women, of 1848, 1849 and 1862, and section 114 of the Code, have conferred upon married women the right to maintain actions, separate and alone, in cases where the wife could not, at common law, maintain actions. The Code (§ 14) provides: "When a married woman is a party, her husband must be joined with her, *except* that 1. When the action concerns her separate property, she may sue alone. 2. When the action is between herself and her husband, she may sue or be sued alone."

Under this section of the Code it was necessary that she should join her husband as a party, in all cases except the two enumerated ones, viz.: when the action concerned her separate property, or was between herself and her husband.

In 1862 the legislature, by section 7 of chapter 172, provided that "any married woman may bring and maintain an action in her own name, for damages, against any person * * * for any injury to her *person* or *character*." (*Mann v. Marsh*, 35 Barb., 68. *Ball v. Bullard*, 52 *id.*, 144.) The facts set out in the plaintiff's complaint do not bring this case under either of the four cases enumerated in section 114 of the Code and section 7 of the act of 1862, and therefore these provisions of law cannot be held to give her any right to maintain an action for the matters therein alleged. These statutes giving married women the right to maintain separate actions remove disabilities only so far as a reasonable construction of their language requires.

The common law remains, except as changed by the

Lindsay v. The People.

legislation referred to ; and if the wife is interested in a cause of action not provided for by such legislation, she must still join her husband as a party. (1 *Chit. Plead.*, p. 28, *margin*.)

It may be that the innovating spirit of modern legislation will still further abrogate the principles of the common law, in respect to the marital relations and rights of husband and wife ; but until such legislation occurs, it must be held that the facts set out in the plaintiff's complaint are not sufficient to constitute a cause of action ; and also that the plaintiff cannot maintain, alone, an action by reason thereof.

The demurrer to the plaintiff's complaint is therefore sustained, with leave to the plaintiff to amend upon payment of costs.

So ordered.

[HERKIMER SPECIAL TERM, July, 1877. *Hardin*, Justice.]

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OWEN LINSDAY, *plaintiff in error*, vs. THE PEOPLE OF THE STATE OF NEW YORK, *defendants in error*.

A court of oyer and terminer has the power, in its discretion, without distinction in respect to the character of the crime, to allow an accomplice to be called and used as a witness for the prosecution.

And after such discretion has been exercised, and the accomplice has testified, the exercise of such discretion should not be reviewed, upon a bill of exceptions.

If the accomplice is jointly indicted with the principal, a *nolle prosequi* may be entered, as to the former, and he may be examined as a witness against the latter.

After proof, by the testimony of an accomplice, of the commission of a murder on the 19th of December, and the removal of the body, by the prisoner, about ten o'clock the next evening, the prosecutor sought to corroborate this evidence by asking a witness, who was at a certain house near the scene of the murder, if he saw the prisoner pass along the highway about ten o'clock, on any evening in December. This was objected to, upon the ground that the testimony would not be corroborative unless the witness first fixed the

Lindsay v. The People.

title. *Held*, that the question was simply introductory or preliminary. That the proof was directed to an important and material fact tending to connect the prisoner with the commission of the crime, or the evening of its commission; and that it was not inadmissible because it was not, in its particulars, certain, positive or conclusive in establishing such fact.

That the evidence was proper for the consideration of the jury, and it was for them to pass upon its force and effect.

On a trial for murder, it is admissible to prove that the deceased had two watches, and how he usually carried them, and that one watch, in a buck-skin case, such as he usually carried, was afterwards seen hanging up in the prisoner's bed-room; the object being to show that the prisoner had property that had previously belonged to the deceased.

Although the testimony of an accomplice, if fully believed, clearly establishes the guilt of the prisoner as the principal offender, and would justify a conviction; yet it is proper for the people, and they are bound, to make such other proof as they are able to make, in corroboration of such testimony.

They are entitled to give proof both of the facts and circumstances attending the commission of the crime, and also such as relates to the person of the prisoner, and connects him with the accomplice and with the commission of the offence.

An accomplice having testified that the murder was committed in a certain stable; *held* that the testimony of another witness, that he had examined said stable and found marks of blood on the face of the manger, on the stairs, and on boards and stringers therein, was proper; being general evidence corroborative of the accomplice's, in respect to the place and fact and circumstances of the murder.

Held, also, that the positive testimony of experts that they plainly discovered stains on chips taken from the floor-boarding of the prisoner's sleigh, composed of blood, and human blood, was admissible, as corroborative of the testimony of the accomplice, that a spot of blood was seen by him on the floor-boards of the prisoner's sleigh, after the removal of the dead body thereon.

When evidence is given and received, tending to prove a material fact, it is not the province of the court to strike it out, or exclude it from the jury, on the ground that it is not decisive, or that its weight has been impaired, or effectually destroyed, on cross-examination or otherwise. Its weight is a question for the jury.

When evidence is objected to, and received under objection and exception, or provisionally, the judge, if doubtful as to its admissibility, may yield to the objection, and strike out the evidence; and if he does so, and directs the jury to disregard it, this takes the testimony out of the case, and the exception with it.

But when the evidence is received unconditionally, and without objection, the judge has no such power; and it would be error to strike it out, as against the party offering the evidence and injured by its exclusion.

Lindsay v. The People.

Where a witness testifies to a palpable untruth, in the presence of the court, the power of the court to order the sheriff to take him into custody, for perjury, is undoubted.

It is a question of discretion with the court whether it will order him into custody, or direct other proceedings to be taken to punish him for the perjury. And with the exercise of that discretion a court of review has no power to interfere.

WRIT of error to the court of oyer and terminer of Onondaga county, upon a conviction of the plaintiff of the crime of murder in the first degree.

The facts of the case, so far as relates to the questions discussed and decided, are fully stated in the opinion.

The case is noted in 5 *Hun*, 104, but not reported in full. The case went to the Court of Appeals, where the judgment was affirmed. (*See* 63 *N. Y.*, 143.)

Frank Hiscock and *Hunt T. Weaver*, for the plaintiff in error.

William C. Ruger and *William James*, (district attorney,) for the people.

By the Court, E. DARWIN SMITH, J. The *corpus delicti* being fully proved and clearly established, the questions and exceptions relating to the identity of the body it can hardly be necessary to consider or discuss. None of the exceptions on this branch of the case have, I think, any substantial merit. The dead body was clearly identified as the body of Colvin, and the fact that he came to his death by violence was unquestionable and unquestioned.

The prominent and substantial issue remained, whether the prisoner committed the crime or participated in its commission. It is quite clear that the case before us presents no evidence which would have warranted the conviction of the accused without the testimony of the witness Vader, who confessed, and testified on the trial that he was an accomplice in the crime, and implicated the prisoner.

Linsday v. The People.

The exception to the decision of the court allowing the said Vader to become a witness for the people presents the first substantial question for our consideration.

The said Vader being indicted with the prisoner in the same indictment, it became necessary, or was deemed proper, by the court of oyer and terminer, to allow the district attorney to enter a *nolle prosequi* as against him, on said indictment, and he was then sworn and improved as a witness on the part of the people.

The court of oyer and terminer undoubtedly had the power, in its discretion, to allow the people to call and use Vader as a witness against the prisoner.

His acceptance and use as a witness for the people implied, if the same was not in fact given or made, an assurance on the part of the state, under the sanction of the court, that he should not be prosecuted, or should be pardoned, for his participation in said crime. The counsel for the prisoner objected and excepted to this exercise of its power by the court of oyer and terminer, and insisted that it ought not to be exercised in favor of an accomplice in a capital case.

The instances, I think, are quite rare in this country where an accomplice in the commission of a murder has been received and used as a witness by the people. Judge Woodworth, in the case of *The People v. Whipple* (9 Cowen, 713,) mentions a case within his personal knowledge where one Jack Hodges, a negro, had been convicted of murder of one Jennings, and who, before sentence, was called and used as a witness for the people on the trial of David Conkling as an accomplice before the fact, in the same murder. On his testimony, chiefly, two persons were convicted in the oyer and terminer of Orange county and executed, and Jack was pardoned by an act of the legislature. In that case—*The People v. Whipple*—the application was to allow the people to use Strang who had been convicted as principal in the murder of Whipple, as a witness against Mrs.

Lindsay v. The People.

Whipple, charged as an accessory. This application was refused, on the ground that Strang was the real guilty party and the court ought not to allow him to be a witness upon the implied pledge that he should be pardoned, which would be involved in receiving him as a witness.

In that case Judge Duer states what I think is the received and recognized rule and practice in the court of oyer and terminer, and has been, ever since it existed as the great court of the common law of original criminal jurisdiction, and in other criminal courts, viz.: that, upon the application of the prosecuting officers, and without distinction in respect to the character of the crime, the court has the power, in its discretion, whenever it is of the opinion that it will promote the ends of public justice, to allow an accomplice to be called and admitted to be sworn and used as a witness for the prosecution.

Upon the representations made by the district attorney to the court, in his opening to the jury and otherwise, in respect to the general character and position of Vader as contrasted with that of the prisoner, and their relation to each other, and the simplicity and frankness with which he confessed his part in the murder, and stated all the facts relating thereto, I think the court in its discretion was justified in allowing the district attorney to call and use him as a witness in the cause, against the prisoner. But if there was any question on this point, I do not think, after the discretion has been exercised and the accomplice has fulfilled his part of the agreement with the people to give full and explicit testimony in the cause, that the court ought, if it had the power, upon exceptions, to review such discretion. We have not been referred to any case in which a court of review has reversed or reviewed the decision of the court of oyer and terminer or other court upon such a question.

Lindsay v. The People.

The people having proved by the witness Vader the perpetration of the murder by the prisoner on the morning of the 19th of December, 1873, and that he removed the dead body on the ensuing evening, about 10 o'clock, with the assistance of the witness, upon a bob-sled drawn by his span of horses and sunk it in the Seneca river where the same was subsequently found, sought to corroborate the witness by the testimony of Freeman Moore, who, having testified that he was at the house of Martin Weaver situated upon the highway between the house of the prisoner and that of Daniel Lindsay, his father, where the alleged murder was committed, was asked if he saw the prisoner pass along said highway about ten o'clock on any evening in December. The counsel for the prisoner objected to the witness answering the question whether he saw the prisoner pass along said road on any evening when he was at the house of said Weaver, unless he first fixed the time; upon the ground that it would not be corroborative of the evidence of Vader. The objection was overruled, and the prisoner's counsel excepted.

The same objection and exception, in substance, was repeated in respect to the testimony of three other witnesses upon the same subject, and to the refusal of the court to strike out this testimony as too remote and furnishing no corroborative proof.

These exceptions are none of them well taken. The question objected to was simply introductory or preliminary. The proof was directed to an important and material fact tending to connect the prisoner with the commission of the crime on the evening of its commission, and was not inadmissible because it was not in its particulars certain, positive or conclusive in establishing such fact.

The evidence offered was proper for the consideration of the jury, and it was for them to pass upon its force and effect. The people sought to show, and the witness

Linsday v. The People.

subsequently testified, that the evening was the 19th of December according to his best recollection from the date and particulars mentioned by him.

The objection that the constable who arrested the defendant said he looked pale, at the time when apprised that he was arrested on the charge of murder, is not well taken. The answer was not responsive to the inquiry put to him, and was not embraced in the ruling by the court at the time, that he might "state any of the facts pertaining to the conduct of the prisoner," and the answer afterwards made was not excepted to.

The exceptions referred to in the defendant's 19th and 20th points are not well taken. It was clearly admissible to prove that the deceased had two watches, and how he usually carried them, and that one watch in a buckskin case, such as he usually carried, was afterwards seen hanging up in the prisoner's bed-room.

The object of this proof was to show that the prisoner had property that had previously belonged to Colvin. The court could not exclude the evidence. Its force and effect are a circumstance belonging to the jury.

The testimony of the witness Vader, if fully believed, clearly established the guilt of the prisoner as the principal offender, and would justify a conviction; but as it is generally unsafe and juries are uniformly advised not to convict upon the uncorroborated testimony of an accomplice, it was proper for the people, and they were bound, to make such other proof as they were able to make in corroboration of such testimony. They were entitled to give proof both of the facts and circumstances attending the commission of the crime, and also such as related to the person of the prisoner, and connected him with the accomplice and with the commission of the offence. (*Wharton's Crim. Law*, sec. 187. *Roscoe's Crim. Ev.*, 122. 1 *Phil. Ev.*, 115, 5th Am. ed.)

The witness Vader had testified that the crime was

Linsday v. The People.

committed in the cow stables of Daniel Linsday, father of the prisoner. The evidence offered and given by the witness Toll, that he examined said stables and found marks of blood on the face of the manger, on the stairs, and on boards and stringers therein, was therefore proper, and the exceptions thereto not well taken. This was general evidence corroborative of Vader's, in respect to place and fact and circumstances of the murder. The witness Vader testified that on the night of the 19th of December, after the body had been deposited in the river and they had returned to defendant's house, and the prisoner had unhitched his team from the sleigh, he saw blood on the sleigh, right where Colvin's head lay, about in the middle of the sleigh, on the boards—the bottom board of the sleigh. "The spot was over a foot in bigness, he should say."

It appears that after the arrest of the prisoner the boards were taken off from said sleigh, and chips cut from the stained spot found on them, and also chips were cut from boards of the floor and manger of the barn where it is alleged the murder was committed, and also from a step of the stairs up which he was taken to the hay-loft above, and these chips sent to Philadelphia and delivered to Professor Richardson, a microscopist in the Philadelphia Hospital, for examination and experimenting for the purpose of determining whether they were stains of human blood. Professor Richardson was called as a witness and asked to state the process and results of his examination of said chips. This was objected to by the defendant's counsel, on the ground that the said stains, whatever they may have been, upon the wood of these boards, had been a long time out of the possession of the defendant, and used and controlled by other persons. The objection was overruled, and the defendant's counsel duly excepted. This exception, I think, was not well taken.

These boards were taken possession of by the public

Linsday v. The People.

officers on the 26th of June, 1874, after the arrest of the defendant, and their possession after that time was fully explained and accounted for by the said officers and other witnesses, and before the arrest they were under the control of the defendant. All the circumstances relating to their possession and use by the defendant and others before the arrest, and of their custody and care afterwards, were proper subjects for the consideration of the jury, in respect to the weight of the testimony based upon an examination of the chips taken therefrom and of the boards themselves, also examined by the witness and others. The court could not exclude the testimony of Dr. Richardson, called as an expert, to make a microscopic and chemical examination of the spots remaining on said boards and upon the chips produced. The testimony of this witness and also of Professor Fowler, who concurred with him, that they plainly discovered and found the stains on the chips taken from the floor-boarding of defendant's sleigh, composed of blood, and human blood, was positive as to the fact, and was clearly admissible as corroborative of the testimony of Vader that a spot of blood was seen by him as above stated upon the floor-boards of the defendant's sleigh, after the removal of the dead body on the 19th of December.

No error was committed by the court in receiving the testimony of the witness Morris that \$300.00 was paid to his bank by the prisoner, on his note at said bank, due on the 27th of December. He testified to such payment at first positively, and afterwards, on further and cross-examination, rendered the fact or amount and time of such payment quite uncertain. The judge ruled that the weight of his testimony belonged to the jury, and denied the motion of the defendant's counsel to strike out the evidence. This was clearly correct. When evidence is given and received tending to prove a material fact, it is not the province of the court to strike

Linsday v. The People.

it out, or exclude it from the jury, on the ground that it is not decisive, or that its weight has been impaired or effectually destroyed on cross-examination, or otherwise.

The same observations apply to several other exceptions to the refusal of the judge to strike out other testimony, and particularly to the testimony of the witness Baker, in respect to the time of the delivery of the oats by Vader and Daniel Linsday. Baker testified that he was in the employ of one Jones as his miller, and knew Vader and Daniel Linsday, and knew of them drawing oats to the mill of Jones in December, 1873, and weighed the oats and took them in, and remembered the occasion when the last load was drawn, and that it was raining. The counsel for the people claimed that this day was Thursday the 18th. The witness was asked if he remembered what day of the week or month it was. The witness answered that he did not know—was not positive—had no memorandum that showed the day, and was then asked what his best recollection was of the day the last load of oats was drawn there. This question was objected to, and not answered, and he was then asked by the court if he had referred to any memorandum made by himself, and he answered that he had referred to the book that belonged to the mill; some of it was his, and some of it was Mr. Johnson's. He was then asked if, having refreshed his recollection by reference to those books, he could then state the day the last load of oats was drawn. Then the counsel for the defendant objected to his consulting any memorandum not made by himself. The court sustained this objection to the question, and the witness answered: "It was from the date of the check given in payment for the oats. I think the last load of oats was drawn a day or two previous to the date of the check; that is my recollection. The check was given subsequent to the delivery of the oats. I can't say positively, but I think a

Linsday v. The People.

day or two before that, the oats were delivered." The witness gave further testimony, and was then cross-examined, and stated that he did not draw the check or see it drawn or delivered; had no personal knowledge of it; that all his knowledge was from the date of the check. He stated that he had seen the check and had it in his possession and knew its date. The witness was further examined and cross-examined, and at the close of his evidence gave considerable testimony in respect to the delivery and weighing and sending off of the oats, and the persons present. The counsel for the defendant then moved that his evidence on the question of when the last load of oats was delivered be struck out; which was denied. This, I think, was not erroneous. The witness had given considerable testimony on that point, aside from the check, relating to the circumstances attending the receipt and shipment of the oats, that could not properly have been stricken out. All that he really professed or was allowed to state on that point was upon his recollection, and it does not appear from his testimony at what precise time the last load of oats was in fact delivered. He stated, however, some facts which, in connection with other testimony, may have tended to fix such time—and this is the nature, in a large degree, of all evidence. It is made up of various items and particulars derived from different sources and witnesses, and the aggregate force of these several particulars or circumstances constitutes reliable evidence, and establishes facts. A judge may doubtless, during the progress of a trial, where evidence is objected to and received under objection and exception or provisionally, and he is doubtful as to its admissibility, yield to the objection and strike out the evidence, as the judge did in this case in respect to part of the testimony of the witness Moore, who had, in response to a general question in respect to the conduct of the prisoner, answered that he smoked quite excessively, more than usual, in the month of De-

Linsday v. The People.

ember. Immediately after this answer, the judge said he did not think he should allow a general criticism into the habits of the prisoner, and he was inclined, if the prisoner's counsel desired, to have the evidence stricken out, and that it might be struck out. The counsel replied that they preferred to have it stand, with their exceptions. The judge thereupon directed it stricken out, and at the same time directed the jury not to regard it.

This, I think, took the testimony out of the case, and the exception with it.

This practice was sanctioned in the case of the *People v. Parish*, (4 Denio, 156,) in which Judge BRONSON said: "It was not unusual for a judge to correct an error into which he may have fallen in the admission of evidence, by striking the testimony out of his minutes and telling the jury to disregard it. When that is done the exception which was taken to the evidence should fall to the ground."

But when the evidence is received unconditionally and without objection, the judge has no such power, and it would be error to strike it out as against the party offering the evidence and injured by its exclusion. (*Hall v. Earnest*, 36 Barb., 591. *The People v. Stevens*, 4 Parker, 396.)

The witness Vader testified that the boat obtained from a Mrs. Crego, and used to carry the body of Colvin to the centre of the river, he returned on Saturday, the 20th, and that he rode part of the way on that occasion towards Baldwinsville with Daniel Linsday, the father of the prisoner, and arrived at Baldwinsville about two o'clock that day. Daniel Linsday, on the defence, testified that he went to Baldwinsville on Saturday, with him, on a load of oats, and that he went there also on the following Tuesday, the 23d, in a cutter, and Vader went with him on this occasion and got out at the cross road leading to Mrs. Crego's, and said he was going

Linsday v. The People.

there, and did not see him at Baldwinsville afterwards, on that day. The people called witnesses to show that Linsday and Vader were together at Baldwinsville at the time stated by Vader, and were allowed to prove by a witness that he saw them there together a day or two before Christmas. This tended, in some degree, to show that Vader was correct in his testimony that it was Tuesday, the 23d, when he and Linsday went together to Baldwinsville. It was a slight and inconclusive circumstance, but I do not think it was erroneous to admit it; and if it were, it was a trivial error and not of the slightest consequence.

It appears that at the close of the testimony of John Vader, a witness called on the part of the defence, the court ordered the sheriff to take him into custody for perjury. This witness testified that he was at the house of his daughter, Mrs. Spore, on the evening of the 21st of December, at her birth day party, and to fix the time of the party, produced a bible, and testified that it was the family bible and contained the record of her birth; that the bible had been in the family forty years, and that his daughter was born the 21st of December, 1833. The witness testified that he saw Francis Colvin at that party on the evening of the 21st, and had conversation with him. The witness testified, also, that the entry in the bible was made with his knowledge and in his presence, soon after the birth of his daughter.

It appeared, upon examination of the bible thus produced, that upon its title page it purported to have been published in 1843, ten years after the birth of said daughter. The court asked the witness if he had any explanation to make in respect to these facts thus appearing; and as he made no satisfactory explanation, the court ordered him into custody for perjury. The power of the court to make such order is undoubted. (2 *Rev. Stat.*, 702, § 5. *Bishop's Crim. Proceed.*, § 229.)

The witness had testified to a palpable untruth in the

Linsday v. The People.

presence of the court, and it was a question of discretion with the court whether it should order him into custody or direct other proceedings to be taken to punish him for the perjury. With this discretion this court, as a court of review, has no power to interfere. This fact was just as patent to the jury as to the court, and we can hardly imagine that the action of the court in respect to it would be likely to have or produce any effect upon their minds injurious to the prisoner.

Of the very numerous objections and exceptions taken by the prisoner's counsel during the progress of this trial, I have thus taken up and considered all those pointed out and particularly described in the briefs of the counsel for the prisoner, and have been unable to come to the conclusion that any substantial error occurred on the trial to the prejudice of the prisoner, or any error of sufficient consequence, at most, to justify this court in reversing the judgment of the oyer and terminer.

The right of review in the superior courts of the state, of the proceedings in criminal cases in the courts exercising original criminal jurisdiction, is of much public consequence and a great security to persons accused of crime. It doubtless secures to them, in many cases, a much fairer and more careful trial in the subordinate court than they would otherwise have; but it would be a reproach to the law and to the administration of public justice tending to make the conviction of high offenders difficult, if not virtually impracticable, in many cases, if the patient and laborious work of weeks in the investigation of crime, by courts and juries, should be brought to naught and overruled in the courts of review, except upon clear, palpable and substantial grounds of error.

We think the judgment in this case, rendered in the court below, was not erroneous; and that it should be affirmed, and the record and proceedings remitted to

Culhane v. New York Central &c. R. R. Co.

the court of oyer and terminer of the county of Onondaga, to carry such judgment and conviction into effect.

Judgment affirmed.

[FOURTH DEPARTMENT, GENERAL TERM at Buffalo, June, 1875.
Mullin, E. Darwin Smith and Gilbert, Justices.]

JOHN CULHANE vs. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY.

In an action for negligence, the question whether a bell was in fact rung, at a street crossing, at the time of a collision with a locomotive, was the chief and material question, at the trial, and the only one submitted to the jury. In behalf of the defendant, five witnesses testified positively that the bell was rung; that they both heard and saw it ringing. For the plaintiff, two witnesses testified that, although present and listening, they *heard* no bell. *Held*, that the burden of proof was with the plaintiff, and he was bound to make out his case, by a preponderance in the testimony, upon the whole issue.

Held, also, that he had failed to do so. That the weight of the testimony was decidedly with the defendant, and the verdict of the jury should have been rendered accordingly.

Although it is the province of the jury to weigh evidence, and to pass upon the credit of the witnesses testifying before them, yet they have no right, arbitrarily and capriciously, to disbelieve the testimony of any unimpeached and uncontradicted witness.

They must consider the relative situation of the witnesses, their means of knowledge, and the character of their testimony; and also their liability to detection and punishment in case they give false testimony.

APPEAL, by the defendant, from a judgment entered upon a verdict in favor of the plaintiff, and also from an order denying a motion for a new trial, on a case and exceptions.

The action was to recover damages for negligence in killing the plaintiff's horse, and damaging his wagon, by means of a collision with an engine of the defendant, at a street crossing, in Rochester.

After the first trial, the case went to the Court of Appeals, and was, by that court, sent back for a new trial. (*See 60 N. Y., 137, S. C.*) On the second trial, the case was not varied, except as appears in the following opinion. The opinion states the facts necessary to a proper understanding of the case.

Harris & Cook, for the appellants.

J. H. Martindale, for the respondent.

By the Court, E. DARWIN SMITH, J. Upon this appeal we are asked to grant a new trial, not upon any question of law, but upon the single ground that the verdict is against the clear weight of the evidence. To establish the cause of action alleged in his complaint the plaintiff was bound to prove that his horse was killed while his servant was attempting to drive him across the defendant's railroad, in the public street, by reason of the negligence of the defendant's agents, without fault on his part.

The attempt to cross the said railroad by such servant, and the collision with the defendant's locomotive, which ensued, occurred in open day about noon, and would apparently seem, as stated by Judge ALLEN in the review of this case upon a former trial, in 60 *N. Y.*, 137, "to have been in part if not wholly the result of carelessness on the part of the servant in charge of the plaintiff's team."

This, I should think, would be clearly so, if the bell upon the defendant's locomotive which caused the injury was in fact rung at the time, and heard by such servant.

The question whether such bell was in fact rung at the time was therefore the chief and material question, at the trial, both in respect to the questions whether the plaintiff's servant was free from fault at the time, and also in respect to the main question of the defendant's negligence.

Culhane v. New York Central &c. R. R. Co.

There was no pretence at the trial, or on the argument before us, that any negligence could be imputed to the defendant except the omission to ring such bell, and this was the only question of fact submitted to the jury.

On this question of fact the learned judge at the circuit, in his charge, states correctly the evidence of the plaintiff's servant who was driving the horse at the time, who stated that as he approached the crossing he listened for the bell and heard none, and also that of a person riding with such servant at the time, who testified substantially to the same effect.

On the part of the defendant, the learned judge states the evidence on this point as follows: Ward, the fireman who had control of the engine, testifies that when he crossed Hudson street on his way up, Peer got on the engine and rang the bell from that point until the time of the accident. Peer testifies to the same thing. Sullivan, who says it was his duty to call the firemen and engineers, says the bell was rung; that he heard it, and saw the man pulling the bell-cord. Milligan testifies that he heard the bell, and saw it swinging; and Hogan testifies, "The bell was ringing." This last witness further testifies, on cross-examination, that he noticed the bell was ringing, because he looked up and saw it ringing.

Here is the testimony of five witnesses, as the judge states it, "given with the degree of positiveness apparent from their statements."

It is affirmative testimony, where there was no room for mistake. These witnesses were on the ground at the time of the collision, and their attention was then directed to the fact of the ringing of such bell.

Each and every of these witnesses were guilty of wilful and corrupt perjury if the said bell was not in fact rung, at the time, as stated by them, to their respective knowledge.

This is not so in respect to the plaintiff's two witnesses. They simply testified that they listened, and

did not hear the bell. That may have been so, without any impeachment of their integrity as witnesses.

Here were five witnesses against two. They were in no way impeached, and there is nothing in the case to show that they were unworthy of belief.

It is doubtless the province of the jury to weigh evidence, and to pass upon the credit of the witnesses sworn and testifying before them, but they have no right, arbitrarily or capriciously, to disbelieve the testimony of any witness not impeached or contradicted. (*Lomer v. Meeker*, 25 N. Y., 363. *Seibert v. Erie Railway Co.*, 49 Barb., 586.)

They must consider the relative situation of the witnesses, their means of knowledge, and the character of their testimony, and also their liability to detection and punishment in case they give false testimony.

The testimony of McKinne and Richard, the plaintiff's witnesses, was not positive; it was merely that they listened and did not *hear* any bell ring. This evidence was doubtless sufficient, *prima facie*, to take the case to the jury on the question whether the bell was in fact rung or not; but it was not capable of contradiction, nor could these witnesses be convicted of perjury if their testimony were false. It was merely that they did not hear any bell; and who could say that they did in fact hear it, however loud it might in fact have rung.

This consideration does not apply to the five witnesses who testified for the defendant that the bell did in fact ring at the time. While it is true that the number of witnesses on each side of the question should not necessarily control in the consideration of the jury, they should nevertheless consider, as in this case, that it was far more unlikely that five witnesses would commit wilful and corrupt perjury than that two would or might do so, when they testify to the same fact with equal means of knowledge. And besides, in this case the jury should have remembered and considered that the

Dingens v. Clancey.

burden of proof was upon the plaintiff, and that he was bound to make out his case by a preponderance in the testimony upon the whole issue. (*Butler v. Hud. Riv. R. R. Co.*, 18 N. Y., 248.) Most clearly the plaintiff on the trial failed to do so.

The weight of the testimony was decidedly with the defendant, and the verdict of the jury should have been rendered accordingly.

The order denying a new trial, and the judgment, should be reversed, and a new trial granted, with costs to abide the event.

Judgment accordingly.

[FOURTH DEPARTMENT, GENERAL TERM at Rochester, October, 1876.
Mullin, E. Darwin Smith and Talcott, Justices.]

JOSEPH A. DINGENS and another vs. MARY J. CLANCEY.

Where goods are sold and delivered to a married woman on the faith and credit of her separate estate, the title thereto passes to her, and they become part and parcel of her separate estate.

The defendant, a married woman, purchased of the plaintiffs liquors, to be used in conducting the business of keeping a hotel owned by her and in her actual possession, and which business she was ostensibly carrying on, with the aid of her husband. Held that the business of keeping such hotel was, in fact and in law, the business of the defendant, within the intent and meaning of the statute relating to business carried on by married women.

Held, also, that the defendant, having so conducted herself as to give the plaintiffs the right to suppose, and act upon the assumption, that she was the actual principal in carrying on the business at said hotel, she could not be allowed to disavow her liability for the goods purchased of them and used in such hotel, for her benefit, and to shift the responsibility for the payment upon her irresponsible husband.

That, under these circumstances, she was estopped from saying, as against the plaintiffs, that she was not carrying on the business of hotel keeping on her own account.

Married women, who own property and control and manage it, and carry on business thereon and therewith, in the same manner as if they were unmarried, or men, should be held to all the legal responsibilities growing out of the exercise of such rights, precisely as though they were in fact men.

Dingens v. Clancey.

They cannot be allowed to hold out false appearances, in such business or matters, any more than men; nor to use their irresponsible husbands as agents or instruments of dishonesty and fraud.

APPEAL from a judgment entered upon the report of a referee. Action to recover the price of goods sold and delivered.

Chas. F. Park, for the appellants.

Bowen, Near & Bonham, for the respondents.

By the Court, E. DARWIN SMITH, J. The referee finds, as matter of fact, that the plaintiff sold and delivered the goods, for which this action was brought, to the defendant on the 29th of May, 1874, at the price and value of \$141.50. That the defendant was then a married woman, the wife of John Clancey of Hornellsville, N. Y., and she, at the time, was possessed of a separate estate in her own right; and that the said goods were sold and delivered by the plaintiffs to the defendant on the faith and credit of her separate estate. He finds, also, that no intention to charge her separate estate was expressed in the contract of sale, and that the contract did not relate to her separate estate, and was not made for the benefit of her separate estate; and also that said liability and contract was not in or about the carrying on of a trade or business of said defendant; and he gave judgment for the defendant.

If, as the finding states, these goods were sold and delivered to the defendant on the faith and credit of her separate estate, the title to them passed to her, and they became part and parcel of her separate estate. (*Williamson v. Dodge*, 5 Hun, 498. *Kelly v. Long*, 4 Thomp. & C., 164. *Knapp v. Smith*, 27 N. Y., 277. *Abbey v. Deyo*, 44 Barb., 374.) The goods sold, however, were for use in a hotel owned by the defendant, and so far did relate to her separate estate.

But I think the referee erred in his finding upon the

Dingens v. Clancey.

facts that the liabilities and the contract, which was for liquors sold, were not in and about the carrying on of a trade or business of the defendant. These liquors, so purchased by her, were purchased for the purpose of carrying on the business of keeping a hotel owned by the defendant at Hornellsville, at the time in the actual possession of the defendant, and which she was in fact ostensibly carrying on with the aid of her husband. And I think the referee should so have found, upon the evidence. The hotel property was hers; the furniture therein was all hers; she superintended the household work. She testified as follows: "I was most always there; all of the last year I had three servants in the hotel; I gave directions to the servants what to do about the kitchen and dining rooms, and upstairs work, and such parts as I took charge of." The guests of said hotel occupied her rooms, slept in her beds, dined at her table, and paid for the services and attendance of herself and her servants. Her husband tended the bar, and took charge, outwardly, of her affairs. He was in fact simply her agent. He had no interest in the rents, use and profits of the hotel or its business. These belonged to her, *prima facie*, by right of her ownership of all the property. He was, doubtless, as she testified, trusted to do her business and receive her rents and moneys, and pay bills. All the receipts of the hotel were used to pay the expenses of the business, and in the support of themselves and their family.

I think the business of keeping said hotel was, in fact and in law, the business of the defendant, within the intent and meaning of the statute relating to the business carried on by a married woman—as much so as the business of carrying on a farm was the business of the wife, and not of the husband, in *Gage v. Dauchy*, (34 N. Y., 297;) *Knapp v. Smith*, (27 *id.*, 277;) or *Buckley v. Wells*, (33 *id.*, 518.)

But if this were not so generally, I think the defen-

Dingens v. Clancey.

dant is estopped in this case from setting up or denying, as against the plaintiff in this action, that she was actually carrying on the business of hotel keeping in her said hotel.

There was no sign up indicating that her husband kept such hotel. Before the plaintiffs sold the bill of liquors, their agent testified that he called at the Tremont House—the name of said hotel, and the only sign affixed to it—for the purpose of selling a bill, and saw Mrs. Clancey, and had conversation with her on the subject, and she then referred him to her husband; that her husband, on the same day, made out the order for the bill, in her name, and directed them to be sent to the defendant's address, and they were so sent, billed and shipped in her name, and were duly received from the carrier at said hotel; that a few weeks afterwards the same agent saw her again, at said hotel, and she recognized him, saying, "You are the gentleman from Buffalo we bought some liquors of, are you?" She then said the liquors were first rate, except the brandy was a little too dark.

Upon these facts and other evidence in the case, I think the defendant should be held estopped from saying that she was not carrying on the business of said hotel, as against these plaintiffs. Married women who own property and control and manage it, and carry on business thereon and therewith, in the same manner as if they were unmarried, or men, should be held to all the legal responsibilities growing out of the exercise of such rights, precisely as though they were in fact men.

They cannot be allowed to hold out false appearances in such business or matters, more than men; nor allowed to use their irresponsible husbands as a cover, or as agents or instruments of dishonesty and fraud.

A married woman must be bound, as Judge ALLEN states the rule in *Bodine v. Killeen*, (53 N. Y., 93,) "by

 Carpenter v. Eastern Transportation Line.

the appearance which she has given to transactions; and upon the faith of which others have acted, up to the limits of her legal capacity to act."

The plaintiffs had the right to suppose, and act upon the assumption, that she was the actual principal in carrying on the business at said hotel, and she cannot be allowed to disavow her responsibility for the goods purchased of them and used in the business of such hotel for her benefit, and cast off the responsibility for the payment upon her irresponsible husband. The judgment should be reversed.

Judgment reversed, and new trial granted, with costs to abide the event. The trial to be had before a new referee.

[FOURTH DEPARTMENT, GENERAL TERM at Rochester, October, 1876.
Mullin, E. Darwin Smith and Talcott, Justices.]

 BROWN CARPENTER vs. THE EASTERN TRANSPORTATION LINE.

In an action against the owners of a tug boat to recover damages for negligence in colliding with, and sinking, a canal boat, evidence to show that the plaintiff had an insurance on his boat, and received a part of his loss from the insurers, is inadmissible.

In such an action, negligence is a question of fact, which belongs to the jury, in view of all the evidence and the attending circumstances; and, if no error occurs in the submission of the cause to them, their verdict in favor of the plaintiff cannot be disturbed.

In his charge to the jury, the judge, referring to the testimony of the various witnesses respecting the manner in which the injury was inflicted upon the plaintiff's boat, said: "If those tugs did come down on the plaintiff's boat then, and became loosened from their moorings, then the defendants are chargeable with this negligence." *Held*, that if the case had been given to the jury with the charge unmodified, or uncorrected, it would have been ground for a new trial.

That it would have been correct if the judge had said that such fact raised a presumption of negligence, and cast upon the defendants the burden of proving

Carpenter v. Eastern Transportation Line.

that such consequence did not follow from the mere getting loose of the tugs, but that such result was imputable to inevitable accident.

At the close of the charge, the defendants' counsel requested the judge to charge as follows: "That if the defendants' boat came down upon the plaintiff's boat, and was forced to do so by pressure of ice upon the tug, which could not have been avoided by the exercise of care and prudence, then there can be no recovery." The judge so charged. *Held*, that this response of the judge to the request must be deemed to have adopted the language of the request, and to have incorporated the same into the charge. That it obviated the error in the charge as previously made, and justified the overruling of the exception to the charge. And that, in that view, a judgment for the plaintiff could be sustained.

The defendants having undertaken to tow the plaintiff's canal boat from New York to Bridgeport, through the sound and the difficult and dangerous pass of Hell Gate; *held* that they were bound to exercise care, caution and diligence in proportion to the dangers of the navigation, and to tow and keep such boat in safety. That they were bound to employ competent and skilful seaman familiar with the locality and with the customary risks attending the navigation upon the waters of the sound, where the tide ebbs and flows.

Held, also, that the defendants' servants were bound to know the state and natural law of the tide, and to take into account its time of flood and ebb, and to guard against all the changes, chances and perils incident thereto; but they were not insurers against the perils of the sea, or of the sound.

APPEAL from a judgment entered on a verdict at the circuit, and from an order denying a motion for a new trial.

The action was to recover damages for carelessly and negligently sinking the plaintiff's canal boat, in the East river, on the 27th of February, 1873. The plaintiff owned the boat Eddie and George, and about the 24th of February, 1873, Crane & Hurd, of Bridgeport, Conn., hired the plaintiff and his boat to receive a cargo of corn, at New York, to be towed by the defendants' steam tugs to Bridgeport. On the 26th of February, the defendants, with their tug boat Terror, towed the plaintiff's boat out of New York harbor, through Hell Gate to Port Morris, where they arrived about dusk, and tied up for the night. The defendants owned two tugs, the Terror and the Vine, both of which were used in towing boats, and each towed a part of the boats through Hell

Carpenter v. Eastern Transportation Line.

Gate to Port Morris, from which place it was designed for one tug to take the whole fleet to its place of destination. When they arrived at Port Morris the plaintiff's boat was tied to the wharf, as directed by the defendants; and the captains of the tugs Terror and Vine placed their tugs abreast, about 150 feet further east, and in the rear of the plaintiff's boat. About one o'clock, in the night, the plaintiff and his crew were alarmed by a collision, and on going upon deck found the steam tug Terror with her bow against the stern of the plaintiff's boat, forcing her from her moorings and against the stern of another boat, called the Brown, lying below her, with such force as to spring a leak in her side and cause her to leak and sink, in deep water, from which she was not recovered or found.

The action was tried by the court and a jury, in Cayuga county, in January, 1876, Justice DWIGHT presiding. And a verdict was found for the plaintiff, for \$3,060, upon which judgment was rendered.

H. R. Selden, for the appellants.

H. N. Howland, for the respondent.

By the Court, E. DARWIN SMITH, J. At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, on the ground that the plaintiff had failed to make out a cause of action, and that there was no evidence of negligence on the part of the defendants. The motion was denied, and the defendants' counsel duly excepted. This exception, I think, was not well taken. The plaintiff had clearly proved, at that stage of the trial, that the defendants' tug boat without fault on his part had run into and struck his canal boat with great force and violence, and that in consequence of such collision the plaintiff's boat was injured and sunk, as alleged in his complaint. The plaintiff had clearly made

Carpenter v. Eastern Transportation Line.

out a *prima facie* cause of action and a tortious injury, or certainly an injury apparently the result of gross carelessness and negligence on the part of the defendants' servants, calling upon the defendants to explain and disprove such apparent wrong. (*The Louisiana*, 3 *Wallace*, 164.)

The motion for a nonsuit was properly denied.

Upon the merits, the question of negligence on the part of the defendants has been passed upon by the jury. It was a question of fact which belonged to them, upon the whole case, and I do not see how their verdict can be disturbed if no error occurred in the submission of the cause to them, in the progress of the trial.

It was not error to overrule the evidence offered to show that the plaintiff had an insurance on his boat and had received part of his loss from the insurance company. Such evidence was held inadmissible in *Merrick v. Brainard*, (38 *Barb.*, 574, *affirmed in Court of Appeals*, 34 *N. Y.*, 208,) and also in *Collins v. Same Defendants*, (5th *Hun*, 506,) and other cases.

In his charge to the jury, the circuit judge, referring to the testimony of the various witnesses in relation to the manner in which the injury was inflicted upon the plaintiff's boat, said as follows: "That if those tugs did come down on the plaintiff's boat there, and became loosened from their moorings, then the defendants are chargeable with this negligence." To this part of the charge the defendants' counsel duly excepted.

Aside from a denial that the defendants' tugs did come down from their moorings and collide with the plaintiff's boat, or were at the time loosened from the wharf to which they were attached, or in any manner caused or contributed to the loss of said boat, the defendants ought also to establish, that if they were in error on this point, and the collision of their tugs with the said canal boat did occur as claimed by the plaintiff, such collision, and the injury consequent thereupon,

Carpenter v. Eastern Transportation Line.

were the result of inevitable accident, or a *vis major*, which human skill and precaution could not have prevented.

The defendants on this branch of their defence had sought to show, and gave evidence tending to prove, that the injury to the plaintiff's boat was caused by an unusual flow of ice coming down the East river from the sound, upon an ebb tide; that their tugs were securely moored at the wharf mentioned in the evidence, where they were fastened on the previous evening, and that such flow of ice was unexpected and unforeseen, and could not have been guarded against; and that such flow of ice forced these tugs from their moorings and caused the said injury.

There was a good deal of conflict in the testimony in respect to the relative position of the plaintiff's boat and the defendants' tugs, and also in respect to the question whether the latter did in fact become loosed from their moorings and collide with the plaintiff's boat; and the defendants claimed that if the plaintiff was correct in his testimony in that respect, such evidence did not establish his cause of action unless it was made to appear, also, affirmatively, that said tugs struck his boat through the carelessness or negligence of the defendants' servants in charge of them; and also insisted that there was no evidence of such negligence. This question of negligence in the control of said tugs, in permitting them to get loose and doing the injury in question to the plaintiff's boat was the chief question of fact in dispute in the cause, and this question of fact was for the jury to decide, in view of all the evidence and the attending circumstances of the case.

The instructions of the judge that "if the tugs did come down on the plaintiff's boat there, and became loosened from their moorings, then the defendants were chargeable with this negligence," was apparently a virtual decision or instruction that it was negligence on the

Carpenter v. Eastern Transportation Line.

part of the defendants to let the said tugs so come down, and excluded the idea that such loosing and coming down of said tugs could have been the result of unavoidable accident, mischance or misfortune, and thus virtually overruled this branch of the defence.

The defendants undertook to tow the plaintiff's canal boat from New York to Bridgeport, through the sound and the difficult and dangerous pass of Hell Gate. They were bound to exercise care, caution and diligence in proportion to the dangers of the navigation, and to tow and keep such boat in safety. The defendants were bound to employ competent and skilful seamen familiar with the locality and with the customary risks attending the navigation upon the waters of the sound where the tide ebbed and flowed.

The defendants' servants were bound to know the state and natural law of the tide, and to take into account its time of flood and ebb, and to guard against all the changes, chances and perils incident to, and therefrom.

But they were not insurers against the perils of the sea, or of the sound. They were bound to use due diligence and care, and proper nautical skill, to guard against such perils, and exercise good and prudent seamanship to conduct the plaintiff's boat safely to its destined haven. They were not responsible for accidents or injuries resulting from unforeseen perils or fortuitous changes of wind, or from storm or tempest, or unusual flood of ice or tidal waves, which they could not foresee and against which, with the utmost care, they could not guard.

If the plaintiff's boat was injured in consequence of any such peril of the sea, or risk of navigation between New York and Bridgeport, not imputable to the defendants' negligence, they were not responsible for the plaintiff's loss.

It was for the jury to pass upon this question.

Carpenter v. Eastern Transportation Line.

In stating to the jury that if the defendants' tugs did come down upon the plaintiff's boat there, and became loosed from their moorings, the defendants were chargeable with this negligence, the learned judge did not, I think, intend to take this question of negligence from the jury, or control their judgment upon the question. He was discussing the question of the conflict in the testimony upon that point; the plaintiff's witnesses, on the ground at the time, positively asserting that the injury to the plaintiff's boat was caused by the tugs getting loose and floating down with the tide and striking said boat, which the defendants' witnesses on the tugs with equal positiveness denied. The judge, in view of such conflict in the evidence, which he clearly left to the decision of the jury, made the remark excepted to, in seeming accord with the theory on which said cause was tried on this point; assuming that if the plaintiff's witnesses were believed on that question the plaintiff had made out a case of negligence, and the defendants were responsible for such negligence.

The charge would have been correct if the judge had said that such fact raised a presumption of negligence, and cast upon the defendants the burden of proving that such consequence did not follow from the mere getting loose of such tugs, but that such result was imputable to inevitable accident.

This would have been in accordance with the proper rule in a similar case, as stated by Judge GRIER in the case of *The Louisiana*, (3 *Wallace*, 164,) where he said: "The collision being caused by the *Louisiana* drifting from her moorings, she must be held liable for the damages consequent thereon, unless she can show that the drifting was the result of inevitable accident, or was *vis major* which human skill and precaution, and a proper display of nautical skill, could not have prevented."

If the case had been given to the jury, with the charge

unmodified or uncorrected, I think the defendants' exception to it would have been a valid one, and we should be constrained to grant a new trial upon that ground. But it appears that at the close of the charge, the defendants' counsel requested the judge to charge as follows: "That if the defendants' boat came down upon the plaintiff's boat and was forced to do so by the pressure of ice upon the tug, which could not have been avoided by the exercise of care and prudence, then there can be no recovery;" and the judge so charged.

The response thus made by the circuit judge to the request of the defendants' counsel, modifies the charge as previously made, and I think corrects the error of said charge in the particular in question.

The request was obviously made in respect to the precise point of the charge embraced in the exception; and the charge as then made, in conformity to such request, must be deemed to adopt the language of the request, and to incorporate the same into the charge, and, I think, be held to obviate the error of the charge as given, and lead to the overruling the exception. In this view the judgment below can be, and I think should be, affirmed.

Judgment and order affirmed.

[FOURTH DEPARTMENT, GENERAL TERM at Rochester, December, 1876.
Mullin, E. Darwin Smith and Talcott, Justices.]

578
578
578

J. DENNISON POTTER vs. STEPHEN B. VIRGIL.

When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts; and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician.

The plaintiff was employed, as a physician, to attend upon the defendant's wife, and while in attendance upon her, and during the continuance of her sickness, she was secretly, and without the knowledge or consent of the defendant, removed to her father's house; where the plaintiff, at her request, continued to attend her. The defendant, though informed that the plaintiff was still visiting his wife, and intended to continue his visits, did not forbid his further attendance. *Held*, that the contract of employment was not revoked, and the plaintiff continued to be the physician of the wife, after her removal to her father's house; and that the defendant was liable to pay for his services as such.

A PPEAL from an order denying a motion for a new trial.

The action was brought to recover for medical services and attendance. It was tried at the Onondaga circuit, in October, 1874, before Justice HARDIN and a jury, when a verdict was directed in favor of the plaintiff, for \$70.20. A motion was made, upon the minutes, for a new trial, which was denied.

The plaintiff was a physician, and attended the defendant's wife during a sickness, at his house, for which service he was fully paid. The wife was taken from the defendant's house secretly, and without the knowledge of the defendant, by her father, and removed, in the night, to his house—a distance of some miles from the defendant's residence—where she continued sick, and was attended by the plaintiff. This action is for services rendered after the removal of the defendant's wife from his residence, as above stated.

The questions made on the hearing, and upon which the motion for a new trial was made, will sufficiently appear in the opinion of the court.

Potter v. Virgil.

Geo. N. Kennedy, for the appellant.

W. C. Ruger, for the respondent.

By the Court, E. DARWIN SMITH, J. The direction at the circuit to the jury to find a verdict for the plaintiff for the amount of his bill for services was based upon the single ground that the plaintiff, having been confessedly employed as a physician to attend upon the defendant's wife, was entitled to recover for his attendance upon her during her entire sickness; and that the relation of physician and patient, arising upon his original employment, continued till her decease.

No question was made, at the trial, that the services of the plaintiff, commencing in January, 1873, and continued by constant attendance from day to day till the 10th day of August afterwards, at the defendant's house, were upon his employment, and that such services had been paid for by the defendant, at the commencement of this action. On the 10th day of August, the defendant's wife, it appears, was removed from his house without his knowledge or consent, by her father to his house, and the services of the plaintiff, for which this action was brought, were rendered at the residence of the said father of the defendant's wife.

In taking the case from the jury, and in refusing the request of the defendant's counsel to submit to them the questions whether the plaintiff was in the employment of the defendant under an expressed and implied engagement on his part, subsequent to the 10th day of August, 1873, or after the removal of the defendant's wife from his house, the circuit judge necessarily assumed that there was no conflict in the evidence, or no such evidence as would justify a verdict for the defendant upon the point on which the decision turned. The rule of law applicable to the case on this question, we think, was

Potter v. Virgil.

correctly stated by the circuit judge in his decision, in disposing of the case.

It was, in substance, that when a physician is employed to attend upon a sick person, his employment continues while the sickness lasts, and the relation of physician and patient continues unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician. The defendant's wife continued sick after her removal to her father's house, and the physician continued to attend her there till the day of her death, on the 19th of September, after such removal.

On the question whether the defendant ever dismissed the physician, or forbade his further attendance upon his wife, there was at the trial no dispute, and no evidence.

The defendant certainly knew that the plaintiff was continuing his visits, more or less, to his wife after her removal to her father's.

The plaintiff testified that soon after the defendant's wife arrived at her father's house he visited her, at her request, and continued to attend her until her death.

On the next day after her removal the defendant called upon the plaintiff, as he testified, to learn what he knew about his wife, and her condition, and the plaintiff told him, frankly. On this occasion the defendant asked the plaintiff if he had been to see her, and the plaintiff told him he had; also how he found her, and the plaintiff told him. The defendant also asked him if he was going there to see her again, and the plaintiff told him he should, on Tuesday, which was the next day (Monday being the 11th of August.)

The defendant's account of this interview is somewhat different. He testified that he called at the doctor's house, and had considerable conversation with him about the occurrence; said: "I told him they had taken her off unbeknown to me, and asked him if he

Potter v. Virgil.

had been down to see her, and he said he had ; I asked him how he found her, and he said comfortable ; I asked him when he was going there again, and he said he did not know—in two or three days.” The defendant testifies, further, that he met the plaintiff on Thursday afterwards, the 14th, at his wife’s father’s, which was six miles distant from the defendant’s place of residence. On this occasion the defendant desired to see his wife, and was refused permission to do so, by her father, who referred him to the doctor. The defendant states that on this occasion the doctor came out of the house to the gate, where he was standing, and he, the defendant, asked him “if he had seen her ? he said he had ; he said she was comfortable, just about the same she was up to your house.”

On the same evening, the defendant testifies that he saw the plaintiff at his house in Delphi, and asked him how she was, when he left. He said comfortable. “I asked him when he was going down again ; he said in two or three days.” The testimony shows, clearly, that in these interviews between the plaintiff and defendant the latter was informed that the plaintiff had visited and was visiting his wife after her removal to her father’s, and intended or expected to continue such visits.

No reason or occasion is or was suggested for his visits to a sick person at a distance of six miles from his home, except in his professional capacity.

The assumption of the circuit judge that the plaintiff still continued to be the physician of the defendant’s wife after her removal to her father’s house, with the knowledge and assent of the defendant, or at least not forbidden and the contract of employment not revoked, was correct, and well founded.

If in these interviews between the plaintiff and defendant, or on any other occasion after the removal of his wife from his house, the defendant had forbidden the further attendance of the plaintiff upon his wife, and the

Downing v. O'Brien.

plaintiff had persisted in doing so, and had brought this action to recover for his services after such prohibition, a very different question would have arisen for our decision.

Upon this branch of the case the circuit judge would have doubtless been bound to submit the evidence to the jury, upon the question whether the abandonment by the defendant's wife of her home, and her removal to her father's house was, under the circumstances of the case, justifiable and proper.

A wife clearly cannot abandon her husband's house and home and bind him by contracts for necessities, provisions, clothing and medical attendance, except upon clear and satisfactory proof of gross abuse, neglect and misconduct on the part of her husband. (*Blowers v. Sturtevant*, 4 Denio, 46. 2 Kent, 146. *Board of Supervisors of Monroe Co. v. Budlong*, 51 Barb., 493.)

The decision of the circuit judge, we think, was correct, and the order denying the motion for a new trial should be affirmed.

Order affirmed.

[FOURTH DEPARTMENT, GENERAL TERM at Syracuse, January, 1876.
Mullin, E. D. Smith and Gilbert, Justices.]

A. JACKSON DOWNING vs. MARGARET O'BRIEN.

Where, in an action upon a promissory note, the defendant pleads that, at the time of making said note, she was a married woman, and that it was not made for the benefit of her separate estate, and was without consideration, the production of the note on the trial, with proof of the defendant's signature thereto, entitles the plaintiff, *prima facie*, to recover, upon the ground that it is, apparently, upon its face, the note of an unmarried woman.

But when, upon the defence, proof is made of the coverture of the defendant, the presumption is changed. Such proof destroys the plaintiff's cause of action, at common law; and if the defendant, and the case, are within the

Downing v. O'Brien.

exception of the statutes relating to married women, the plaintiff is bound and entitled to prove it, in reply to such proof.

A ruling which casts upon the defendant the burden of proving a negative, and of making out affirmatively that she had no separate estate, did not carry on any separate business, nor make the contract in question for the benefit of her separate estate or business, is erroneous.

The defence of coverture having been set up in the answer, the defendant, after proving that at the time of making the note, she was a married woman, has established, *prima facie*, a perfect defence to the action.

Such defence can only be overcome by proof that she had a separate estate, or that she was carrying on a separate business on her own account, and that the note was given for her own benefit, within the statutes removing the disabilities of coverture, in those particulars.

A PPEAL from a judgment entered on a verdict at the circuit.

The action was brought upon a promissory note as follows :

“ *Macedon, March 5, 1873.*

\$45.50.

Eight months after date, I promise to pay to the order of Wm. O'Brien forty-five $\frac{10}{100}$ dollars, at the First National Bank of Palmyra, value rec'd with interest.

(Signed) MARGARET O'BRIEN.”

Indorsed “WILLIAM O'BRIEN.”

The defendant pleaded that at the time of the making of said note, she was a married woman, and the wife of the defendant William O'Brien; and that such note was not made for the benefit of her separate estate, and was without consideration.

The issue was tried at the Wayne circuit, in November, 1875, by the judge, without a jury. He directed a verdict for the plaintiff for \$55.06.

The opinion sufficiently presents the points arising on the trial, and decided by the court.

J. W. Collins, for the appellant.

—————, for the respondent.

Downing v. O'Brien.

By the Court, E. DARWIN SMITH, J. The defence of coverture having been set up in the answer, when the defendant had proved that she was a married woman at the time of making the note, she had established, *prima facie*, a perfect defence to the action. Such defence could only be overcome by proof that she had a separate estate, or that she was carrying on a separate business on her own account, and that said note was given for her own benefit, within the statutes of this state removing the disability of coverture, in those particulars.

The common law was, and is, that all personal contracts of married women are absolutely void. The ability to make a valid contract, allowed by those statutes, constitutes an exception to the general rule. The party who claims the benefit of such exception, and to enforce a contract thus presumptively void, must bring it and his case within the exception of the statute.

The production of the said promissory note, with proof of the defendant's signature thereto, at the circuit, entitled the plaintiff, *prima facie*, to recover upon the ground that it was apparently, upon its face, the note of an unmarried woman. The plaintiff was entitled, therefore, to rest upon the mere proof of the defendant's signature, as he did at the trial.

But when, upon the defence, proof was made of the coverture of the defendant, the presumption changed. This proof destroyed the plaintiff's cause of action, at common law, and if the defendant and the case were within the exception of our statute, the plaintiff was bound and entitled to prove it, in reply to such proof, in the same manner as, in our former system of pleading, the plaintiff would be bound to reply such facts to a plea of coverture.

The ruling at the trial, to the contrary, was therefore error. It treated the defendant as if the general rule of law were that married women were presumptively liable on all their contracts, and that they must show an ex-

Downing v. O'Brian.

emption from such liability, to establish a defence to the action.

This is the reverse of the rule as hitherto held and applied, as I understand it, in this class of cases, and is quite an injurious ruling if sustained, as against married women. The law has been careful to protect married women in respect to contracts made by and with them, from any injustice and imposition.

The ruling in this case casts the burden upon the defendant to prove a negative, and to make out affirmatively that she had no separate estate, and did not carry on any separate business, and did not make the contract in question for the benefit of her separate estate or business.

The effect of the ruling is seen upon the finding of the learned judge upon the facts. Instead of finding that said note was given either for the benefit of her separate estate or for her benefit in carrying on a separate business, or on the credit of her separate estate—which would have warranted the judgment against her and was the question in issue—the learned judge finds that it does not appear that she made the note as a surety for her husband, or any other person, and that it appears from the form of the note that she executed the same as the principal debtor, and for her own benefit, thus inverting the issue and rule of liability, and giving force to the error of the ruling that the burden of the proof was upon her to show affirmatively her exemption from liability, by a preponderance of evidence.

This case was tried by the judge without a jury; and it may be that no substantial injustice was done by this ruling in respect to the burden of proof, but the question is one of considerable practical consequence, and we are not at liberty to overrule the exception upon that assumption. The ruling is in conflict with what has been held in *Kinne v. Kinne*, (45 How., 68;) *Hallock v. De Munn*, (2 N. Y. Sup. C., 350;) *Stevens v. Bost-*

Shaw v. Republic Life Insurance Company.

wick, (4 *id.*, 632;) *Williamson v. Dodge*, (12 *id.*, 497;) and other cases.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

New trial granted.

[FOURTH DEPARTMENT, GENERAL TERM at Syracuse, January, 1876.
Mullin, E. D. Smith and Talcott, Justices.]

MARY A. SHAW vs. THE REPUBLIC LIFE INSURANCE
COMPANY.

The defendant having bought out and taken the risks of the H. Life Insurance Company, by M., its authorized agent, urged S., who held a life policy for \$2,000, issued by the H. Co., that had lapsed by non-payment of premiums, to take a new policy for the same amount in the defendant's company. The result was, the execution of an instrument by M., as such agent, dated Nov. 26, 1872, by which he acknowledged the receipt of the lapsed policy, "in exchange for which" the defendant agreed to "issue its policy of the same amount, and deliver the same within a reasonable time, and in the meantime keep the insurance good." At the same time S. executed his promissory note to the defendant, for \$54.76, being the amount of premium in its company for one year, payable in forty days.

Held, 1. That the agreement and note were to be considered and construed as constituting and evidencing the transaction had, at their date, between the parties.

2. That the instrument signed by M. constituted an agreement binding upon the defendant to issue to S. a policy in the defendant's company, upon the life of S., for the same amount specified in his former policy.
3. That such agreement constituted, in itself, in legal effect, from its date, a policy of insurance, or imposed a legal duty and obligation to execute and deliver such policy in proper form, bearing the date of such agreement.
4. That the policy which the defendant was, by such contract, to execute, was a new and independent contract to be executed and delivered in consideration of the sum of \$54.76, and in payment of that sum the defendant took and received the said promissory note of S.
5. That such note of S. must be presumed to have been received in payment of the premium of the new policy. That it was an original undertaking.

Shaw v. Republic Life Insurance Company.

payable in a specified time, without reference to the time when the policy was to be delivered.

6. That the non-payment of such note at maturity did not affect the validity of the policy; the contracts being independent of each other, and there being no stipulation, in the agreement, that non-payment of the note should avoid the policy.

A PPEAL from a judgment in favor of the plaintiff for \$2,250.25. The case was tried at the Ontario circuit in February, 1875, before Hon. JAMES C. SMITH, a justice of the court.

The plaintiff proved the possession of a policy of insurance issued by the Hahneman Life Insurance Company, dated September 8, 1868, on the life of her husband, for \$2,000; and that in September, 1871, the defendant bought out and took the risks of the said Hahneman Life Insurance Company, and, by its duly authorized agent, executed and delivered to the plaintiff the following receipt or agreement :

“The Republic Life Insurance Company.

J. V. Laundst, President.

A. W. Kellogg, V. President.

O. E. More, Secretary.

Received, November 26, 1872, of Richard B. Shaw, policy No. 2,705 issued by the Hahneman Life Insurance Company of Cleveland, Ohio, and now in force, bearing date September 8, 1868, for the amount of \$2,000, with an annual premium, payable on the 8th day of September in each year; in exchange for which, the Republic Life Insurance Company will issue its policy of the same amount, and deliver the same within a reasonable time, and in the meantime keep insurance good.

(Signed)

F. E. MARBLE,

Special Agent.”

At the same time S. executed his promissory note to the defendant, for \$54.76, being the amount of premium in the defendant's company for one year, payable in forty days.

Shaw v. Republic Life Insurance Company.

The opinion sufficiently states the questions that arose upon the trial, and upon which the decision at the circuit was made.

Lyman & Jones, for the appellant.

E. W. Gardiner, for the respondent.

By the Court, E. DARWIN SMITH, J. The rights of the parties in this action depend entirely, as we conceive, upon the agreement executed by Marble, the defendant's agent, on the 26th day of November, 1872. This agreement and the promissory note of Shaw, the plaintiff's husband, for \$54.76, executed at the same time, are to be considered and construed as constituting and evidencing the transaction at that time had between the parties.

Marble was the general managing agent of the defendant, and was particularly engaged in taking up the policies of insurance of the Hahneman Life Insurance Company. He came to Shaw, the plaintiff's husband, who had previously obtained and held a policy in said Hahneman Company, payable to his wife, and finding that such policy had lapsed by reason of the non-payment of the premium for several months, he urged said Shaw to take a new policy in the defendant's company in lieu of such lapsed policy. The result of such application and agreement was the execution of the agreement and note above mentioned. This agreement, we think, was properly considered by the judge at the circuit as constituting an agreement binding upon the defendant to issue to said Shaw a policy in the defendant's company upon the life of said Shaw for the same amount specified in his former policy in the said Hahneman Company. Such agreement constituted, in itself, in legal effect, we think, from its date, a policy of insurance, or imposed a legal duty and obligation to execute and deliver such policy in proper form, bearing the

Shaw v. Republic Life Insurance Company.

date of such agreement, as held by the circuit judge. It had no necessary connection with the Hahneman policy.

That policy had expired, and was at an end. It constituted, perhaps, an inducement to the execution of said agreement by said Marble, but not a consideration, in any sense, for the execution of the said policy. The policy which the defendant, by this contract, was to execute, was a new and independent contract to be given, executed and delivered in consideration of the sum of \$54.76, which was the premium in the defendant's company for one year; and in payment of this \$54.76 the company, by its said agent, took and received the negotiable promissory note of the plaintiff's husband, payable in forty days after date. The judge at the circuit correctly held that that note must be presumed to have been received in payment of the premium of the new policy.

It was executed at the same time with the agreement for the policy, and was not given or received in payment of, or as collateral to, a pre-existing debt. It was an original undertaking, payable in forty days, without any reference to the time when the policy was to be delivered.

Such policy was by the terms of the agreement to be delivered "within a reasonable time," which the proofs show was in ten days or thereabouts.

The defendant's office or place of business—the home office—was in Chicago, and the proofs show that they executed and sent to their agent in this state a policy in conformity with said agreement, dated December 1st, thereafter—four days after the date of said agreement.

The non-payment of this note at maturity does not affect the validity of the policy. The contracts were independent of each other. The defendant had an ample remedy at law upon the said note, and it appears

Lathrop v. American Board of Foreign Missions.

that payment upon it in the lifetime of Shaw was offered and tendered to the defendant's agent, having the same for collection. In the cases where it has been held that the non-payment of a note given for a premium upon a policy of insurance forfeited the policy, there was an express agreement in the policy that the non-payment of the note should avoid the policy. Such was the case of *Baker v. The Union Mutual Ins. Co.*, (43 N. Y., 284;) and *Wall v. Home Ins. Co.*, (36 *id.*, 157.)

No such stipulation was contained in the agreement for the insurance in this case.

The question of fact in the case was properly settled by the jury, and we see no valid exceptions to any of the rulings of the court in other respects.

The judgment should be affirmed.

Judgment affirmed.

[FOURTH DEPARTMENT, GENERAL TERM at Syracuse, January, 1876.
Mullin, E. D. Smith and Gilbert, Justices.]

LATHROP and another, executors, &c., *respondents*,
vs. THE AMERICAN BOARD OF FOREIGN MISSIONS
and others, *appellants*.

Although a monomaniac may make a valid will, if the delusion which affects the general soundness of his mind has no relation to the subject or object of the will, or the persons who would otherwise be likely, ordinarily, to be the recipients of his bounty; or where the provisions of the will are entirely unconnected with, and uninfluenced by, the particular delusions; yet where the will is the result of that particular delusion which has seized his mind, and controls its operations, the rule is otherwise.

On an application to the surrogate, for probate of a will executed by B. in 1867, the evidence showed that in 1838 the testator was insane, and was, for some time, confined in the insane asylum. After his discharge, and in 1844, he had an acute attack of insanity. From that time down to the time of his death, in 1870, the proofs showed, in his acts and declarations, nu-

Lathrop v. American Board of Foreign Missions.

merous facts clearly indicative of an unsound and diseased mind. He was a chronic and confirmed monomaniac in respect to the freemasons, and expressed fears of the loss of his property and life from them. Connected with this delusion was also a delusion that there was a conspiracy among his friends and acquaintances, to rob him of his property. He said he could not have anything to do with his folks; that they were all masons, or under the influence of masons; that he did not want any of his relations to have any of his property, because they were masons. *Held* that it was quite apparent that the will was prepared, dictated and executed under the influence of these delusions; and that in this view, it was an insane will, and the testator was actually *non compos mentis*, when it was made and executed, and incapable of making any will.

Held, also, that a decree of the surrogate, finding, adjudging and declaring that the testator was not of sound mind and memory, at the time of executing said will, and refusing to admit the same to probate, was right, and warranted by the evidence.

A PPEAL from a decree of the surrogate of Wyoming county, refusing probate to the will of John Barden, deceased.

G. F. Danforth, for the appellants.

H. C. Comstock, for the respondents.

By the Court, E. DARWIN SMITH, P.J. It appears by the decree of the surrogate, from which this appeal was brought, that the instrument purporting to be the will of John Barden, deceased, was denied probate on the ground that said Barden was not of sound mind and memory, at the time of executing said instrument. No opinion of the surrogate appears among the appellants' papers, but such decision, we presume, was made as a question of fact upon the mass of evidence taken by him and returned upon this appeal. Upon a careful examination and consideration of such evidence, we are satisfied that such decision and conclusion of the surrogate was correct, and warranted by the evidence.

The will upon its face, considered in the light of the extrinsic evidence, was an unnatural one. It ignores

Lathrop v. American Board of Foreign Missions.

entirely all the instincts and ties of nature, in respect to kith and kindred. It appears that the testator, at the time of making the will, had living two brothers and two sisters, and quite a number of nephews, nieces and collateral relations, none of whom are mentioned in his will.

The evidence shows that Barden was insane, in the year 1838, and for some time was confined in the insane asylum in the city of New York.

Soon after he was discharged from the asylum, he removed to the state of Michigan, where he remained nearly twenty years, and then returned to this state, in 1866, and remained here until his death, in 1870. A physician who was called to see him in Niles, Michigan, in the spring of 1844, testified that he found him laboring under quite an acute attack of insanity.

From that time, during his stay in Michigan and after his return to this state, and down to the time of his death in 1870, the proofs show, in his acts, declarations and conduct, numerous facts clearly indicative of an unsound and disordered mind.

During all this period, I should think, he was a chronic and confirmed monomaniac in respect to the freemasons, and fears in respect to the loss of his property and life from the freemasons. And connected with a delusion on this subject was, also, a delusion that there was a conspiracy among his friends and acquaintances to rob him of his property. Dr. Richardson testified that when he attended him in 1844 he seemed to be laboring under the idea that some one was conspiring to rob him of his property.

A monomaniac may undoubtedly make a valid will if the delusion which affects the general soundness of his mind has no relation to the subject or object of the will, or the persons who would otherwise be likely, ordinarily, to be the recipients of his bounty; or where, as Judge Gridley states the rule in *Stanton v. Wetherwax*,

(16 *Barb.*, 263,) "the provisions of the will are entirely unconnected with, and of course uninfluenced by, the particular delusions." But where there is good reason to believe that the will is the result of that particular delusion which has seized his mind, and controls its operations, the rule is otherwise. (*Ibid.*)

The delusion of Barden related particularly to his property, and to his personal relations. After his return to this state, and when asked by an old friend with whom he was conversing about what he should do, "why he did not go to New York to his sister and make himself and her happy, too," he replied: "I can't have anything to do with my folks. They are all masons, or under the influence of masons, and I don't want anything to do with masons."

To the same friend, in 1866, (the will was made in March, 1867,) who again suggested to him to go to New York and make his home there with his sister, he replied, "No; the men are masons, and the women are under their influence." In October or November, 1866, Barden said to a person with whom he was then boarding, that he was in fear all the time, that the masons were going to murder him; he said that they had robbed him once, and that he was afraid they were going to murder him. This he repeated a number of times, and said he never should give Andrew or William (his brothers) any of his property, because they were d—d masons, and they had as lieve they (the masons) would murder him for his property, as not.

He said to another witness, in December of the same year, that he did not want any of his relations to have any of his property, because they were masons.

Such conversations occurred often, with a number of other witnesses. The delusion in respect to the masons and their purpose to kill him to get his property, or to rob him of his property, grew more and more marked,

Lathrop v. American Board of Foreign Missions.

confirmed and embittered, and he constantly connected his relations, particularly his brothers and their sons, with the masons, and declared that the women were under their influence, down to the time of his death.

It is quite apparent, I think, that his will was prepared, dictated and executed under the influence of these delusions, and that in this view it was an insane will, and that he was actually *non compos mentis* when it was made and executed, and incapable of making any will. He was not of sound mind and memory at the time of executing said will, as found, adjudged and declared in the decree of the surrogate.

It is such a case as is described by Judge DENIO, in the *Seamen's Friend Society v. Hopper*, (33 N. Y., 624,) as follows: "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. Such a person is essentially mad, or insane, on those subjects, though on other subjects he may reason, act and speak like a sensible man."

In the same case, page 640, Judge BROWN says, that "when the delusion of a man, under such circumstances, relates to the persons who would in the natural course of things become the objects of the testator's care, solicitude and bounty, and especially upon whom the law would cast the inheritance of his property, the instrument must be regarded as invalid to pass the estate, because it does not express the will of a testator of sound and disposing mind."

The same view is taken upon the subject of a delusion of testator, by Chief Justice COCKBURN in a very able opinion discussing the whole subject of insanity, in *Banks v. Goodfellow*, (22 L. T. R., 813; 39 L. J. R., 237.)

Birmingham v. Farmers' Joint Stock Ins. Co.

In accordance with these views, we think the judgment and decree of the surrogate should be affirmed.

Decree affirmed.

[FOURTH DEPARTMENT, GENERAL TERM at Buffalo, June, 1876. *E. D. Smith, Gilbert and Merwin*, Justices.]

THOMAS BIRMINGHAM *vs.* THE FARMERS' JOINT STOCK
INSURANCE COMPANY.

A policy of insurance contained a provision that, in case of loss or damage, the insured should forthwith give notice of said loss to the company, as soon as possible, and, within twenty days, render a particular account of such loss, sworn to, &c. The answer set out this condition of the policy, and averred that the plaintiff failed to perform such condition. *Held*, that this was a sufficient specification of a particular breach of, or failure to perform, this condition, to meet a general allegation that the plaintiff had fulfilled all the conditions of the policy, and to put such fact in issue.

The proof of loss, required by the conditions of a policy, was not furnished within the time therein specified. The plaintiff claimed there had been a waiver of the proof. The evidence of such waiver consisted of a letter from the defendant's secretary, in which he acknowledged the receipt of notice of the fire and of a request for proof-blanks, and said: "We have no proof-blanks at hand. It will probably be two weeks before our adjuster can reach this case." *Held*, that this was not a waiver of proofs of loss.

One of the conditions of a policy was, that "no act or omission of the company, or any of its officers or agents, shall be deemed, construed or held to be a waiver of a full and strict compliance with the foregoing provision of this section [relating to notice and proof of loss]; nor of any extension of time to the assured for compliance, except it be a waiver or extension in express terms, and in writing, signed by the president or secretary of the company." By another section of the conditions, it was declared that the policy was "made and accepted upon the foregoing terms, conditions and restrictions, and that nothing less than a distinct specified agreement in writing, signed by an officer of the company, shall be construed as a waiver thereof." *Held*, that the above mentioned letter of the defendant's secretary was not such an agreement as was specified in the condition, nor was it so intended.

Held, also, that these conditions were binding upon the assured, and precluded a recovery upon the policy, in a case where it was not claimed or pretended that they had been complied with by serving notice and proof of loss within the time specified therein, and there was no proof of waiver.

Birmingham v. Farmers' Joint Stock Ins. Co.

MOTION for a new trial, on exceptions to an order nonsuiting the plaintiff, ordered to the General Term, to be there heard in the first instance.

The action was on a policy of insurance upon the plaintiff's dwelling house and contents. Loss \$566.95. It was tried at the Steuben circuit, in November, 1874, before the Hon. C. C. DWIGHT, circuit judge. The plaintiff was nonsuited at the trial. The questions upon which the nonsuit was granted sufficiently appear in the opinion.

Hacker & Stevens, for the plaintiff.

Pratt & Brown, for the defendant.

By the Court, E. DARWIN SMITH, J. The policy upon which this action is brought contains a provision that in case of loss or damage by fire, the person sustaining such loss shall forthwith give notice of said loss to the company, as soon as possible, and within twenty days render a particular account of such loss, sworn to by them, stating the cash value of each article destroyed, and the amount of damage to each damaged article.

The answer of the defendant sets out this condition of the policy, and avers that the plaintiff failed to perform such condition.

This was a sufficient specification of a particular breach of, or failure to perform, this condition of the policy, to meet a general allegation that the plaintiff had fulfilled all the conditions of said policy, and to put such fact in issue. It is not pretended, and was not claimed at the trial, that the plaintiff had in fact complied with or fulfilled this condition of the policy. The fire occurred on the 15th day of June, 1873. Notice of such fire was given the 24th of the same month, and the proof of loss appears to have been verified on the 23d of July, thereafter, and to have been sent by mail to the

Birmingham v. Farmers' Joint Stock Ins. Co.

defendant on the 28th and actually received by the defendant on the 30th day of the same month, and to have been on the same day rejected by the said company and returned to the plaintiff's attorneys, for the reason that they were not received within the time required by the condition of said policy.

The plaintiff was allowed, at the trial, to give proof tending to show that the defendant had waived the delivery of said proofs of loss within the twenty days specified in the condition of said policy ; but he entirely failed, I think, to make satisfactory proof of such waiver, as required by the terms of the policy. The chief proof consisted in the letter of the secretary of the defendant's company, dated June 28th, in which he acknowledged the receipt of the notice of the fire, and of a request for proof-blanks, and wrote as follows : " We have no proof-blanks at hand. It will probably be two weeks before our adjuster can reach this case."

This was no waiver of the service of proofs of loss. It did not dispense with them, and merely suggested that the agent or officer who looked into cases of fire and adjusted terms, could not probably reach said case, in due order of business, within two weeks. It was, I should think, rather a suggestion to the plaintiff to get such proofs in within that time. It was no part of the duty of the defendant's company to furnish blanks for proofs of loss ; and there is no evidence showing, or tending to show, that it was customary for said company to do so ; or that they ever kept blanks for such purpose.

But this letter and the proofs, besides, do not make out a case of waiver, within the terms of the condition annexed to said policy as to the service of proof of loss, above referred to.

One clause of said section or condition, numbered section 8, is as follows : " No act or omission of the company, or any of its officers or agents, shall be deemed, construed or held to be a waiver of a full and strict com-

Birmingham v. Farmers' Joint Stock Ins. Co.

pliance with the foregoing provision of this 8th section ; nor of any extension of time to the assured for compliance, except it be a waiver or extension in express terms and in writing, signed by the president or secretary of the company."

Section 11 of the said conditions annexed to the policy further declares that "said policy is made and accepted upon the foregoing terms, conditions and restrictions, and that nothing less than a distinct specified agreement in writing, signed by an officer of the company, shall be construed as a waiver thereof." The letter of the defendant's secretary, above referred to, is no such agreement, and was not so intended.

These provisions in the conditions annexed to the policies issued by the defendant's company, have been inserted therein since the decision of the case of *Owen v. This Defendant*, (57 Barb., 518,) which was before this court some years since, at General Term in the Seventh District, where I had occasion to discuss this question of waiver and other questions. These conditions are clearly binding on the plaintiff, and preclude a recovery in this action, upon the evidence given at the circuit.

The nonsuit was clearly right, and the motion for a new trial should be denied.

Motion denied.

[FOURTH DEPARTMENT, GENERAL TERM at Buffalo, June, 1876. *Mullin*, E. D. Smith and Talcott, Justices.]

GEORGE MECHL *vs.* DANIEL SCHWIECKART, Jun., and
HENRY BAUER.

Where a plaintiff brings an action, in this court, claiming damages in the sum of \$150, and recovers less than \$50, the action being one of which a justice's court would have jurisdiction, but for the excessive claim of damages, he is bound to pay costs to the defendant.

In an action of trespass for entering upon premises owned by a church, called St. Peter's church, and cutting down, prostrating and destroying a shed thereon, in the use and occupation of, and belonging to, the plaintiff, the answer denied that the shed was in the use and possession of the plaintiff, or that the defendants injured or destroyed it. For a second answer, the defendants averred that they were trustees of said St. Peter's church; that the parties and other persons attending said church, having changed their place of worship to another edifice near by, known as St. James' church, authorized and directed the defendants to remove said shed, with others, to the premises of the latter church; and that under and in pursuance of such license, the defendants removed the shed to such premises, and there put it up, for the plaintiff's use. *Held* that these answers did not deny the plaintiff's title to the shed, or set up title in the defendants. And that no question of title to real property arose, upon the pleadings, or was put in issue, within the intent of section 304 of the Code.

A claim of license does not necessarily involve an assertion of title, or raise an issue of title to the land to which it relates.

When the license is alleged to have been given by the plaintiff himself, this excludes the idea of an assertion of title in any one else, or any purpose to question or controvert the plaintiff's title, or put it in issue.

A PPEAL from an order made at Special Term, denying costs to the plaintiff and giving costs to the defendant.

The questions decided, and the facts upon which they depend, sufficiently appear in the opinion.

W. H. Green, for the appellant.

E. L. Parker, for the respondents.

By the Court, E. DARWIN SMITH, J. So far as the question of costs depended upon the amount of damages in the plaintiff's complaint, it is well settled that such claim cannot be sustained.

The action was one of which a justice's court would have jurisdiction, if the plaintiff had not claimed dam-

Mechl v. Schwieckart.

ages exceeding the jurisdiction of the justice. A plaintiff who brings such an action in this court and recovers less than \$50 damages is clearly bound to pay the costs to the defendant. (*Seaman v. Glegner*, 3 *Hun*, 119. *New v. Anthony*, 4 *id.*, 52. *Powers v. Green*, 6 *id.*, 234, affirmed in *Court of Appeals*, *Albany Law Journal*, vol. 14, p. 12.)

No certificate of the circuit judge having been procured or produced, showing that the claim of title to real property came in question at the trial, the plaintiff's claim to costs depends upon, and is limited to, the single question whether such claim arises, on the pleadings, under section 304 of the Code.

The action, as stated in the complaint, is trespass for entering, by the defendants, upon the premises owned by a church, called St. Peter's church, in the town of Eden, Erie county, and cutting down, prostrating and destroying a shed, No. 1, situated thereon, in the use and occupation of the plaintiff, and belonging to him, of the value of \$150.

The answer denies that the said shed mentioned in the complaint was in the use and possession of the plaintiff, and denies that the defendants injured or destroyed said shed; and for a second answer, the defendants averred that they, with another person named, were trustees of said St. Peter's church, and that prior to the alleged trespass the parties to this action, and others who attended public worship at St. Peter's church, changed their place of worship to another church edifice near by, known as St. Jacob's church, and authorized and directed the defendants to remove said shed, with others, to the St. Jacob's church property; and that under and in pursuance of such licence from the plaintiff and other owners of said sheds, the defendants removed the same to said St. Jacob's church property, and there put up said shed, for the use of the plaintiff if

Meehl v. Schwieckart.

he desired it; and these are the same acts of which the plaintiff complains.

These answers do not deny the plaintiff's title to said shed, or set up title in the defendants. The first answer denies simply his possession of said shed, and the second answer impliedly admits the ownership of the shed, and sets up a license from him to remove this shed to the St. Jacob's church grounds, for his use.

The defendants simply assert that they removed this shed, with others standing on the grounds of St. Peter's church, to the grounds of St. Jacob's church, by the license of the trustees of St. Peter's church, and of the plaintiff and other worshippers at said church. No issue of title is necessarily raised by these answers. The claim of license does not necessarily involve an assertion of title, or raise an issue of title to the land to which it relates. (*Rathbone v. McConnell*, 21 N. Y., 466.)

If the validity of a license from other persons than the plaintiff was questioned at the trial and there tried, an issue of title or the right to give such license might arise, which would present a case where a claim of title arose and came in question on the trial. In such case, upon the certificate of the judge stating such fact, the plaintiff would be entitled to costs. But here the license is alleged to have been given by the plaintiff himself, and this excludes the idea of an assertion of title in any one else, or any purpose to question or controvert his title or put it in issue.

We do not think that any question of title to real property arises upon the pleadings, or was put in issue, within the intent of section 304 of the Code.

The decision of the Special Term was therefore correct, and should be affirmed, with \$10 costs and disbursements.

Order affirmed.

[FOURTH DEPARTMENT, GENERAL TERM at Buffalo, October, 1876.
Mullin, E. Darwin Smith and Talcott, Justices.]



A

TABLE OF CASES

IN

BARBOUR'S SUPREME COURT REPORTS,

67 VOLUMES,

AFFIRMED, REVERSED, APPROVED, OVERRULED, &c.

- A
- ACKLEY v. TARBOX, vol. 29—512. *Reversed*, 31 N. Y. 564.
- Adams v. Fox, vol. 40—442. *Reversed*, 40 N. Y. 577.
- Adams v. Van Alstyne, vol. 35—9. *Affirmed*, 25 N. Y. 232.
- Akin v. Western R. R. Corporation, vol. 30—305. *Reversed*, 20 N. Y. 370.
- Albany & Schenectady R. R. Co. v. Osborn, vol. 12—223. *Overruled*, vol. 48—17; 48 N. Y. 70.
- Albany & West Stockbridge R. R. Co. v. Town of Canaan, vol. 16—244. *Overruled*, vol. 48—70, 173.
- Alexandre v. Sun Mutual Ins. Co., vol. 49—475. *Reversed*, 51 N. Y. 253.
- Allen v. Brown, vol. 50—86. *Affirmed*, 44 N. Y. 237.
- Allen v. Cowan, vol. 28—99. *Reversed*, 23 N. Y. 502.
- American Bible Society v. Hebard, vol. 51—552. *Affirmed*. See 41 N. Y. 619.

- American Home Missionary Society v. Wadhams, vol. 10—597. *Reversed*, 12 N. Y. 415.
- American Seaman's Friend Society, vol. 43—625. *Affirmed*, 33 N. Y. 624.
- Ansonia Brass & Copper Co. v. New Lamp Chimney Co., vol. 64—435. *Affirmed*, 53 N. Y. 123.
- Armstrong v. New York Cen., &c., R. R. Co. vol. 66—437. *Affirmed*, 64 N. Y. 635.
- Artisans' Bank v. Treadwell, vol. 34—553. *Affirmed*, 25 N. Y. 489.
- Ashley v. Marshall, vol. 30—426. *Affirmed*, 27 How. 599.
- Atlantic Dock Co. v. Leavitt, vol. 50—135. *Affirmed*, 54 N. Y. 35.
- Atlantic Nat. Bank of N. Y. v. Franklin, vol. 64—449. *Reversed*, 55 N. Y. 235.
- Attorney General ex rel. Marselus v. Reformed Prot. Dutch Church, vol. 33—303. *Affirmed*, 33 How. 616.
- Auburn & Cato Plank Road Co. v. Douglass, vol. 12—553. *Reversed*, 9 N. Y. 444.
- Anstin, Matter of, vol. 44—434. *Reversed*, 42 N. Y. 155.
- Ayres v. Western R. R. Corporation, vol. 48—132. *Reversed*, 45 N. Y. 260.

B

- Babbett v. Young, vol. 51—466. *Affirmed*, 51 N. Y. 238.
- Bacon v. Gilman, vol. 60—640. *Affirmed*, 57 N. Y. 656.
- Baker v. Hoag, vol. 3—203. *Disapproved*, 18 N. Y. 155. *Reversed*, 7 N. Y. 555.
- Baker v. Spencer, vol. 58—248. *Affirmed*, 47 N. Y. 562.

- Baldwin v. City of Buffalo, vol. 29—396. *Affirmed*, 35 N. Y. 375.
- Baldwin v. Mayor, &c., of New York, vol. 45—359. *Affirmed*, 2 Keyes, 387.
- Baldwin v. United States Telegraph Co., vol. 54—505. *Reversed*, 45 N. Y. 744.
- Ball v. Liney, vol. 44—505. *Reversed*, 48 N. Y. 6.
- Ballard v. Burgett, vol. 47—646. *Affirmed*, 40 N. Y. 314.
- Ballou v. Parsons, vol. 67—19. *Affirmed* at General Term, and by Court of Appeals. See 53 N. Y. 673.
- Bangs v. Scidmore, vol. 24—29. *Affirmed*, 21 N. Y. 136.
- Bank of Rome v. Village of Rome, vol. 27—65. *Affirmed*, 16 N. Y. 20.
- Barnard v. Campbell, vol. 65—286. *Affirmed*, 55 N. Y. 456.
- Barnard v. Monnot, vol. 34—90. *Reversed*, 3 Keyes, 203.
- Barnes v. Allen, vol. 30—663. *Reversed*, 1 Keyes, 390.
- Barnes v. Perine, vol. 9—202. *Affirmed* at General Term, vol. 15—249; in Court of Appeals, 12 N. Y. 18.
- Barteau v. Phoenix Mutual Life Ins. Co., vol. 67—354. *Affirmed* by Court of Appeals. See 10 Hun, v.
- Bartlett v. Drew, vol. 60—648. *Affirmed*, 57 N. Y. 587.
- Bartlett v. Judd, vol. 23—262. *Affirmed*, 21 N. Y. 200.
- Barton v. City of Syracuse, vol. 37—292. *Affirmed*, 36 N. Y. 54.
- Baskin v. Baskin, vol. 48—200. *Affirmed*, 36 N. Y. 416.
- Bassett v. Bassett, vol. 55—505. *Affirmed*, 46 N. Y. 170.
- Battle v. Rochester City Bank, vol. 5—414. *Affirmed*, 3 N. Y. 8.
- Baulec v. New York & Harlem R. R. Co., vol. 62—623. *Affirmed*, 59 N. Y. 356.

- Baxter v. Ryerss, vol. 13—267. *Overruled*, 42 N. Y. 167.
- Beach v. Bay State Company, vol. 27—248. *Reversed*, at General Term, vol. 30—433.
- Beach v. Cooke, vol. 39—360. *Affirmed*, 28 N. Y. 508.
- Beach v. Reynolds, vol. 64—506. *Affirmed*, 53 N. Y. 1.
- Beals v. Home Ins. Co., vol. 36—614. *Affirmed*, 36 N. Y. 522.
- Beebe v. Hutton, vol. 47—187. *Reversed*, 38 How. 123.
- Beecher v. Allen, vol. 5—169. *Questioned*, 1 Code Rep., N. S., 257. *Overruled*, 12 N. Y. 593.
- Beekman v. People, vol. 27—260. *Affirmed*, 23 N. Y. 298.
- Belger v. Dinsmore, vol. 51—69. *Reversed*, 51 N. Y. 166.
- Bendetson v. French, vol. 44—31. *Reversed*, 46 N. Y. 266.
- Bennett v. Buchan, vol. 53—578. *Reversed*, 61 N. Y. 222.
- Bennett v. Cooper, vol. 57—642. *Reversed*. See 6 Albany L. J. 175.
- Bentley v. Columbia Ins. Co., vol. 19—595. *Affirmed*, 17 N. Y. 421.
- Bernhardt v. Rensselaer & Saratoga R. R. Co., vol. 32—165. *Affirmed*, 23 How. 166.
- Bigler v. New York Central Ins. Co., vol. 20—635. *Affirmed*, 22 N. Y. 402.
- Bingham v. Disbrow, vol. 37—24. *Reversed*, 14 Ab. 451; 5 Trans. Ap. 198.
- Binsse v. Wood, vol. 47—624. *Affirmed*, 34 How. 629.
- Birdseye v. Flint, vol. 3—500. *Overruled*, vol. 58—349.
- Bissel v. Torrey, vol. 65—188. *Affirmed*, 60 N. Y. 635.
- Bissell v. Balcom, vol. 40—98. *Reversed*, 69 N. Y. 275.
- Bissell v. New York Cen. R. R. Co., vol. 29—602. *Reversed*, 25 N. Y. 442.

- Bissell v. New York Cen. & Hud. Riv. R. R. Co., vol. 67—385. *Affirmed* at Gen. Term, Id. 393, note a.
- Blackwell v. Wiswall, vol. 24—355. *Affirmed* at Gen. Term, Id. 362, note.
- Blanchard v. New Jersey Steamboat Co., vol. 67—101. *Affirmed*, 59 N. Y. 292.
- Blanchard v. Western Union Telegraph Co., vol. 67—228. *Approved*, and adopted by Court of Appeals, 60 N. Y. 513.
- Bliss v. Matteson, vol. 52—335. *Affirmed*, 45 N. Y. 22.
- Bliven v. Hudson River R. R. Co., vol. 35—108. *Affirmed*, 36 N. Y. 403.
- Blossom v. Champion, vol. 28—217. *Virtually Overruled*, vol. 35—554.
- Bonesteel v. Garlinghouse, vol. 60—388. *Affirmed*, 45 N. Y. 249.
- Booth v. Bierce, vol. 40—114. *Reversed*, 38 N. Y. 592.
- Booth v. Bunce, vol. 35—496. *Reversed*, 24 N. Y. 592.
- Booth v. Farmers' and Mechanics' Nat. Bank, vol. 65—457. *Reversed*, 50 N. Y. 396.
- Bornsdorff v. Lord, Matter of, vol. 41—211. *Limited*, 53 N. Y. 1; *Overruled*, 64 Barb. 506; 46 N. Y. 200.
- Bostwick v. Baltimore & Ohio R. R. Co., vol. 55—107. *Reversed*, 45 N. Y. 712.
- Boughton v. Otis, vol. 29—196. *Affirmed*, 21 N. Y. 261.
- Bowling Green Savings Bank v. Todd, vol. 64—146. *Affirmed*, 52 N. Y. 489.
- Boynton v. Clinton & Essex Mutual Ins. Co., vol. 16—254. *Overruled*, 17 N. Y. 401.
- Bradford v. Fox, vol. 39—203. *Reversed*, 38 N. Y. 289.
- Brand v. Troy & Schenectady R. R. Co., vol. 8—368. *Overruled*, 20 N. Y. 65.
- Brett v. Bucknam, vol. 32—655. *Questioned*, vol. 61—347.

- Brewster v. Baker, vol. 16—613. *Overruled*, vol. 20—364.
- Brewster v. Silence, vol. 11—144. *Affirmed*, 8 N. Y. 207.
- Briggs v. Boyd, vol. 65—197. *Affirmed*, 56 N. Y. 289.
- Briggs v. Briggs, vol. 20—477. *Affirmed*, 15 N. Y. 471.
- Briggs v. North British Mercantile Ins. Co., vol. 66—325. *Affirmed*, (it seems,) 53 N. Y. 446, *sub nom.* Briggs v. North American Mercantile Ins. Co.
- Briggs v. Palmer, vol. 20—392. *Modified*, 20 N. Y. 15.
- Briggs v. Vanderbilt, vol. 19—222. *Overruled*, 17 N. Y. 306; 28 *id.* 217.
- Brigham v. Tillinghast, vol. 15—618. *Reversed*, 13 N. Y. 215.
- Brinckerhoff v. Phelps, vol. 43—469. *Affirmed*, 40 N. Y. 59.
- Brockway v. Burnap, vol. 12—347. *Reversed* at General Term, vol. 16—309.
- Brookman v. Hamill, vol. 54—209. *Affirmed*, 43 N. Y. 554.
- Brooks v. Buffalo & Niagara Falls R. R. Co., vol. 25—600. *Affirmed* by Court of Appeals. See vol. 27—532, note *a*.
- Brouwer v. Cotheal, vol. 10—216. *Affirmed*, 5 N. Y. 562.
- Brower v. Peabody, vol. 18—599. *Reversed*, 13 N. Y. 121; 11 How. Pr. 492.
- Brown v. Brown, vol. 53—217. *Affirmed*. See 6 Albany L. J. 167.
- Brown v. New York Cen. R. R. Co., vol. 31—385. *Affirmed*, 32 N. Y. 597.
- Brown v. Smith, vol. 24—419. *Approved*, 35 N. Y. 243.
- Bruce v. Davenport, vol. 36—349. *Reversed*, 3 Keyes, 472.

- Brundage v. Brundage, vol. 65—397. *Affirmed*, 60 N. Y. 544.
- Bryan v. Butts, vol. 27—503. *Affirmed*, 28 How. 582, *n*.
- Bryant v. Poughkeepsie Mutual Fire Ins. Co., vol. 21—154. *Affirmed*, 17 N. Y. 200.
- Buckley v. Wells, vol. 42—569. *Reversed*, 33 N. Y. 518.
- Buffit v. Troy & Boston R. R. Co., vol. 36—420. *Affirmed*, 40 N. Y. 168.
- Bump v. Van Orsdale, vol. 11—634. *Overruled*, 18 N. Y. 52.
- Bundy v. Bundy, vol. 47—135. *Affirmed*, 38 N. Y. 410.
- Burke v. Nichols, vol. 34—430. *Affirmed*, 31 How. 640.
- Burke v. Valentine, vol. 52—412. *Affirmed*. See 6 Alb. L. J. 167.
- Burr v. Stenton, vol. 52—377. *Affirmed*, 43 N. Y. 462.
- Burritt v. Silliman, vol. 16—198. *Reversed*, 13 N. Y. 93.
- Burt v. Dewey, vol. 31—540. *Reversed*, 40 N. Y. 283.
- Bush v. Prosser, vol. 13—221. *Approved*, by Harris, J., 10 How. Pr. Rep., 131. *Reversed*, 11 N. Y., 347.
- Butler v. Benson, vol. 1—526. *Overruled* on the question of evidence, 22 N. Y., 462 ; 29 *id.* 346.
- Butterworth v. O'Brien, vol. 28—187. *Affirmed*, 23 N. Y. 275.
- Button v. McCauley, vol. 38—413. *Reversed*, 5 Ab., N.S., 29.
- Butts v. Wood, vol. 38—181. *Affirmed*, 37 N. Y. 317.

C

- Cagger v. Lansing, vol. 57—421. *Reversed*, 43 N. Y. 550.
- Calkins v. Falk, vol. 39—620. *Affirmed*, 41 N. Y. 619.

- Callanan v. Van Vleck, vol. 36—324. *Affirmed*, 41 N. Y. 619.
- Caldwell v. New Jersey Steamboat Co., vol. 56—425. *Affirmed*. See 6 Alb. L. J. 168.
- Campbell v. Adams, vol. 38—132. *Overruled*, vol. 44—108.
- Campbell v. Consalus, vol. 40—509. *Affirmed*, 41 N. Y. 216.
- Cambell v. Cothran, vol. 65—534. *Affirmed*, 56 N. Y. 279.
- Campbell v. Evans, vol. 53—566. *Affirmed*, 45 N. Y. 356.
- Campbell v. Rawdon, vol. 19—494. *Reversed*, 18 N. Y. 412.
- Campbell v. Woodworth, vol. 26—648. *Reversed*, 20 N. Y. 499.
- Campbell v. Woodworth, vol. 33—425. *Affirmed*, 24 N. Y. 425.
- Carpenter v. Blake, vol. 60—488. *Reversed*, 50 N. Y. 696.
- Carpenter v. Danforth, vol. 52—581. *Approved*. See 12 Alb. L. J. 195.
- Carpenter v. O'Dougherty, vol. 67—397. *Affirmed*, at Gen. Term, Id. 402, note a.
- Carroll v. Cone, vol. 40—220. *Affirmed*, 41 N. Y. 216.
- Carroll v. Staten Island R. R. Co., vol. 65—32. *Affirmed*, 58 N. Y. 126.
- Caryl v. Russell, vol. 18—429. *Reversed*, 13 N. Y. 194.
- Cassidy v. City of Brooklyn, vol. 60—105. *Affirmed*, 47 N. Y. 659.
- Castle v. Duryea, vol. 32—480. *Affirmed*, 2 Keyes, 169.
- Caughy v. Smith, vol. 50—351. *Reversed*, 47 N. Y. 244.
- Caujolle v. Ferrie, vol. 26—177. *Affirmed*, 23 N. Y. 90.

- Cazeaux v. Mali, vol. 25—578. *Approved*, vol. 38—435.
- Center v. Finney, vol. 17—94. *Affirmed*, Seld. Notes, 44.
- Central Bank v. Empire Stone Dressing Co., vol. 26—23. *Reversed*, 22 How. 571, *n*.
- Champney v. Coope, vol. 34—539. *Modified*, 32 N. Y. 543.
- Cheaney v. Arnold, vol. 18—434. *Affirmed*, 15 N. Y. 345.
- Chester v. Dickerson, vol. 52—349. *Affirmed*, 54 N. Y. 1.
- Childs v. Smith, vol. 55—45. *Reversed*, 46 N. Y. 34.
- Christopher v. Mayor &c. of New York, vol. 13—567. *Disapproved*, 18 N. Y. 155.
- Chrystie v. Phyfe, vol. 32—195. *Reversed*, 19 N. Y. 344.
- Church v. Brown, vol. 29—486. *Reversed*, 21 N. Y. 315.
- City of Brooklyn v. Brooklyn City R. R. Co., vol. 57—497. *Affirmed*, 47 N. Y. 475.
- City of Buffalo v. Holloway, vol. 14—101. *Affirmed*, 7 N. Y. 493.
- City Savings Bank v. Bidwell, vol. 29—325. *Reversed*, 30 N. Y. 263.
- City of Utica v. Churchill, vol. 43—550. *Affirmed*, 33 N. Y. 161. *Reversed* by Supreme Court of the United States.
- Claffin v. Farmers' and Citizens' Bank of Long Island, vol. 36—540. *Reversed*, 25 N. Y. 293 ; 24 How. 1.
- Claffin v. Sanger, vol. 31—36. *Affirmed*, 11 Abb. 338.
- Clancy v. Byrne, vol. 65—344. *Reversed*, 56 N. Y. 129.
- Clapp v. Meserole, vol. 38—661. *Affirmed*, 1 Keyes, 281.
- Clark v. Cottrell, vol. 63—335. *Reversed*, 42 N. Y. 527.
- Clark v. Eighth Av. R. R. Co., vol. 32—657. *Affirmed*, 26 N. Y. 135.
- Clark v. Mayor &c. of New York, vol. 3—388. *Reversed*, 4 N. Y. 438.
- Clark v. Norton, vol. 58—434. *Affirmed*, 49 N. Y. 243.

- Clark v. Syracuse & Utica R. R. Co., vol. 11—112. *Overruled*, it seems, 13 N. Y. 42.
- Clark v. Wise, vol. 57—416. *Reversed*, 46 N. Y. 612.
- Clarke v. City of Rochester, vol. 24—446. *Affirmed*, 28 N. Y. 605.
- Clemens v. Clemens, vol. 60—366. *Affirmed*, 37 N. Y. 59.
- Clements v. Gerow, vol. 30—325. *Reversed*, 1 Keyes, 297.
- Clements v. Village of West Troy, vol. 16—251. *Reversed*, 10 How. Pr. 199.
- Cleveland v. Boerum, vol. 23—201. *Affirmed* at General Term, vol. 27—252; also in Court of Appeals, 24 N. Y. 613.
- Cleveland v. Boerum, vol. 27—252. *Affirmed*, 24 N. Y. 613.
- Cleveland v. Whiton, vol. 31—544. *Reversed*, 25 How. 593.
- Clift v. White, vol. 15—70. *Reversed*, 12 N. Y. 519.
- Clinton v. Hope Ins. Co., vol. 51—647. *Affirmed*, 45 N. Y. 454.
- Cobb v. Dows, vol. 9—230. *Reversed*, 10 N. Y. 335.
- Cobb v. Harmon, vol. 29—472. *Affirmed*, 23 N. Y. 148.
- Cobb v. Titus, vol. 13—45. *Affirmed*, 10 N. Y. 198.
- Coburn v. Wheelock, vol. 42—267. *Affirmed*, 34 N. Y. 440.
- Cole v. Cole, vol. 53—607. *Affirmed*. See 6 Alb. L. J. 168.
- Cole v. Jessup, vol. 9—395. *Affirmed*, 10 N. Y. 96; 10 How. Pr. 516.
- Cole v. Jessup, vol. 2—309. *Affirmed*, 10 N. Y. 96; 10 How. Pr. 516.
- Cole v. Trustees of Village of Medina, vol. 27—218. *Approved*, vol. 32—634.
- Collender v. Dinsmore, vol. 64—457. *Reversed*, 55 N. Y. 200.

- Collins v. Albany and Schenectady R. R. Co., vol. 12—492. *Overruled*, 38 N. Y. 178.
- Colwell v. Lawrence, vol. 38—643. *Affirmed*, 38 N. Y. 71.
- Commercial Bank of Albany v. Ten Eyck, vol. 50—9. *Affirmed*, 48 N. Y. 305.
- Commercial Bank of Pennsylvania v. Union Bank of New York, vol. 19—391. *Affirmed*, 11 N. Y. 203.
- Commercial Bank of Rochester v. City of Rochester, vol. 41—341. *Affirmed*. See 41 N. Y. 619.
- Comstock v. Buchanan, vol. 57—127. *Affirmed*, Id. 146, *note*.
- Condit v. Baldwin, vol. 21—181. *Affirmed*, 21 N. Y. 219.
- Congress & Empire Spring Co. v. High Rock Congress Spring Co., vol. 57—526. *Reversed*, 45 N. Y. 291.
- Conhocton Stone Co. v. Buffalo, N. Y. & Erie R. R. Co., vol. 52—390. *Reversed*, 51 N. Y. 573.
- Conkey v. Bond, vol. 34—276. *Affirmed*, 36 N. Y. 427.
- Conklin v. Furman, vol. 57—484. *Affirmed*, 48 N. Y. 527.
- Connolly v. Poillon, vol. 41—366. *Affirmed*. See 41 N. Y. 619.
- Cook v. Travis, vol. 22—338. *Affirmed*, 20 N. Y. 400.
- Cooke v. Meeker, vol. 42—533. *Affirmed*, 36 N. Y. 15.
- Cooke v. State Nat. Bank of Boston, vol. 50—339. *Affirmed*, 52 N. Y. 96.
- Cookingham v. Lasher, vol. 38—656. *Affirmed*, 2 Keyes, 454.
- Corn Exchange Ins. Co. v. Babcock, vol. 57—222. *Reversed*, 42 N. Y. 613.
- Corning v. Greene, vol. 23—33. *Affirmed*, 26 N. Y. 472.
- Corning v. Troy Iron and Nail Factory, vol. 39—311. *Affirmed*, 40 N. Y. 191.

- Coyle v. City of Brooklyn, vol. 53—41. *Affirmed*.
See 41 N. Y. 619.
- Cox v. Clift, vol. 3—481. *Affirmed*, 2 N. Y. 481.
- Cox v. James, vol. 59—144. *Affirmed*, 45 N. Y. 557.
- Crafts v. Mott, vol. 5—305. *Affirmed*, 4 N. Y. 603.
- Craig v. Rochester City & Brighton R. R. Co., vol. 39—494. *Affirmed*, 39 N. Y. 404.
- Craig v. Ward, vol. 36—377. *Affirmed*, 3 Keyes, 387.
- Crain v. Beach, vol. 2—120. *Affirmed*, 2 N. Y. 86.
- Cram v. Union Bank of Rochester, vol. 42—426. *Affirmed*, 4 Keyes, 558.
- Cramer v. Blood, vol. 57—155, 671. *Affirmed*, 48 N. Y. 684.
- Crane v. Baudoine, vol. 65—260. *Reversed*, 55 N. Y. 256.
- Crater v. Bininger, vol. 54—155. *Affirmed*, 45 N. Y. 545.
- Croswell v. Crane, vol. 7—191. *Overruled*, 5 N. Y. 462; 8 How. Pr. 141; 2 E. D. Smith, 100.
- Cruger v. McClaughry, vol. 51—642. *Affirmed*, 43 N. Y. 107.
- Cuff v. Dorland, vol. 50—438. *Reversed*, in part, at General Term, vol. 55—481; also in Court of Appeals, 57 N. Y. 560.
- Culver v. Haslam, vol. 7—314. *Approved*, vol. 13—550. *Overruled*, 8 N. Y. 371. See 17 id., 340.
- Cunliff v. Mayor &c. of Albany, vol. 2—190. *Reversed*, 2 N. Y. 165.
- Curtis v. Leavitt, vol. 17—309. *Modified and affirmed*, 15 N. Y. 9; 17 id., 521.
- Curtis v. Stilwell, vol. 32—354. *Reversed*, 25 How. 592.
- Curtiss v. Rochester & Syracuse R. R. Co., vol. 20—282. *Affirmed*, 18 N. Y. 534.
- Cuyler v. McCartney, vol. 33—165. *Affirmed*, 40 N. Y. 221.

D

- Dana v. Munro, vol. 38—528. *Affirmed*, 23 N. Y. 564.
- Dascomb v. Buffalo and State Line R. R. Co, vol. 27—221. *Affirmed*, 24 How. 609.
- Davis v. Talcott, vol. 14—611. *Reversed*, 12 N. Y. 184.
- Day v. New York Cen. R. R. Co., vol. 53—250. *Reversed*, 51 N. Y. 583.
- Day v. Pool, vol. 63—506. *Affirmed*, 52 N. Y. 416.
- De Baun v. Mayor &c of New York, vol. 16—392. *Overruled*, 18 N. Y. 155.
- De Beerski v. Paige, vol. 47—172. *Affirmed*, 36 N. Y. 572.
- De Camp v. Eveland, vol. 19—81. *Overruled*, in part, 20 N. Y. 447.
- Deck v. Johnson, vol. 30—283. *Affirmed*, 2 Keyes, 348.
- De Groff v. American Linen Thread Co., vol. 24—375. *Reversed*, 21 N. Y. 124.
- Demarest v. Wickham, vol. 67—312. *Affirmed*, 63 N. Y. 320.
- De Nottbeck v. Astor, vol. 16—412. *Affirmed*, 13 N. Y. 98.
- Devlin v. Brady, vol. 32—529. *Affirmed*, 23 N. Y. 331.
- Devoe v. Brandt, vol. 58—493. *Reversed*, 53 N. Y. 462.
- Devoy v. Mayor &c. of New York, vol. 35—264. *Affirmed*, 33 How. 316.
- Devoy v. Mayor &c. of New York, vol. 39—169. *Affirmed*, 36 N. Y. 449.
- De Witt v. Barley, vol. 13—550. *Reversed*, 9 N. Y. 371.
- Dexter v. Norton, vol. 55—272. *Affirmed*, 47 N. Y. 62.
- Dickerson v. Wason, vol. 54—230. *Reversed*, 47 N. Y. 439.

- Dillingham v. Ladue, vol. 35—38. *Reversed*, 37 N. Y. 198.
- Dimon v. Delmonico, vol. 35—554 *Affirmed*, 6 Abb. Dig. 20.
- Dinehart v. Wells, vol. 2—432. *Affirmed* by Court of Appeals, June, 1850.
- Disosway v. Winant, vol. 34—578. *Reversed*, 33 How. 460.
- Dole v. Gould, vol. 5—490. *Overruled*, 1 N. Y. 415.
- Doll v. Earle, vol. 65—298. *Affirmed*, 59 N. Y. 638.
- Donovan v. Mayor &c. of New York, vol. 44—180. *Reversed*, 33 N. Y. 291.
- Dorn v. Backer, vol. 61—597. *Reversed*, 61 N. Y. 261.
- Doubleday v. Kress, vol. 60—181. *Reversed*, 50 N. Y. 410.
- Doughty v. Brill, vol. 36—488. *Affirmed*, 3 Keyes 612.
- Dows v. Greene, vol. 32—490. *Affirmed*, 24 N. Y. 638.
- Drake v. Robinson, vol. 7—388. *Affirmed*, 5 N. Y. 430.
- Dresser v. Dresser, vol. 35—573. *Reversed*, 26 How. 600.
- Dubois v. Baker, vol. 40—556. *Affirmed*, 30 N. Y. 355.
- Dudley v. Hawley, vol. 40—397. *Affirmed*, 39 N. Y. 441.
- Duffy v. Duncan, vol. 32—587. *Affirmed*, 35 N. Y. 187.
- Duke of Cumberland v. Graves, vol. 9—595. *Affirmed*, 7 N. Y. 305.
- Dunham v. Williams, vol. 36—136. *Reversed*, 37 N. Y. 251.
- Durando v. Durando, vol. 32—529. *Affirmed*, 23 N. Y. 331.
- Dyckman v. Mayor &c. of New York, vol. 7—498. *Affirmed*, 5 N. Y. 434.
- Dyckman v. Valiente, vol. 43—131. *Affirmed*, 42 N. Y. 549.
- Dygert v. Remerschneider, vol. 39—417. *Affirmed*, 32 N. Y. 629.

E .

- East River Bank v. Hoyt, vol. 41—441. *Reversed*, 29 How. 280.
- Eastern Plank Road Co. v. Vaughan, vol. 20—155. *Affirmed*, 14 N. Y. 546.
- Eaton v. Alger, vol. 57—179. *Affirmed*, 47 N. Y. 345.
- Edgerton v. New York & Harlem R. R. Co., vol. 35—389. *Affirmed*, 39 N. Y. 227.
- Edmonston v. McLoud, vol. 19—356. *Affirmed*, 16 N. Y. 543.
- Ellis v. Duncan, vol. 21—230. *Affirmed*, 26 How. 601, *n.*
- Elwell v. Grand Street & Newtown R. R. Co., vol. 67—83. *Affirmed* at General Term. See *Id.* 85, *note*.
- Ely v. New Haven Steamboat Co., vol. 53—207. *Overruled*, 50 N. Y. 121; 52 *id.* 51.
- Ely v. Spofford, vol. 22—231. *Reversed*, 41 N. Y. 619.
- Emerson v. Bowers, vol. 14—658. *Reversed*, 14 N. Y. 449.
- Emerson v. Spicer, vol. 55—428. *Affirmed*, 46 N. Y. 504.
- Enders v. Sternbergh, vol. 52—222. *Reversed*. See 41 N. Y. 619.
- Erben v. Lorillard, vol. 23—82. *Reversed*, 19 N. Y. 299.
- Erie Railway Co. v. Ramsey, vol. 57—449. *Affirmed*, 45 N. Y. 637.
- Ernst v. Hudson River R. R. Co., vol. 32—159. *Affirmed*, 39 N. Y. 61.
- Esterly v. Cole, vol. 1—235. *Affirmed*, 3 N. Y. 235.
- Everitt v. Everitt, vol. 29—112. *Reversed*, 29 N. Y. 39.
- Everitt v. Everitt, vol. 41—385. *Reversed*, 37 How. 600.
- Excelsior Petroleum Co. v. Embury, vol. 67—261. See *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; where, it seems, the principle of this case was affirmed.

• F

- Fake v. Whipple, vol. 39—339. *Affirmed*, 39 N. Y. 394.
- Farmers' Loan and Trust Co. v. Harmony Fire and Marine Ins. Co., vol. 51—33. *Affirmed*. See 41 N. Y. 619.
- Feidler v. Darrin, vol. 59—651. *Reversed*, 50 N. Y. 437.
- Ferrin v. Myrick, vol. 53—76. *Reversed*, 41 N. Y. 315.
- Ferris v. Kilmer, vol. 47—411. *Reversed*, 48 N. Y. 301.
- Ferris v. People, vol. 48—17. *Affirmed*, 35 N. Y. 125 ; 31 How. 140.
- Field v. New York Cen. R. R. Co., vol. 29—176. *Affirmed*, 28 How. 383.
- Finnegan v. Carahar, vol. 61—252. *Affirmed*, 47 N. Y. 493.
- First Nat. Bank of Sandy Hill v. Fancher, vol. 52—138. *Affirmed*, 48 N. Y. 524.
- First Nat. Bank of Whitehall v. Lamb, vol. 57—429. *Reversed*, 50 N. Y. 95.
- Fitch v. Bates, vol. 11—471. *Approved*, vol. 18—409.
- Fitzgerald v. People, vol. 49—122. *Affirmed*, 37 N. Y. 413.
- Flagg v. Thurber, vol. 14—196. *Modified*, 9 N. Y. 483.
- Fleeman v. McKean, vol. 25—474. *Approved*, vol. 28—393.
- Fleming v. Hollenbeck, vol. 7—271. *Overruled*, in part, 20 N. Y. 134.
- Fletcher v. Button, vol. 6—646. *Affirmed*, 4 N. Y. 396.
- Flynn v. Stoughton, vol. 5—115. *Overruled*, 7 N. Y. 576.
- Follett v. People, vol. 17—193. *Reversed*, 12 N. Y. 268.
- Foote v. Lathrop, vol. 53—183. *Affirmed*, 41 N. Y. 358.

- Foreman v. Foreman, vol. 7—215. *Reversed*, 11 N. Y. 544.
- Fort Edward & Fort Miller Plank Road Co. v. Payne, vol. 17—567. *Reversed*, 15 N. Y. 583.
- Fosgate v. Herkimer Manuf'g & Hydraulic Co., vol. 12—352. *Affirmed*, 12 N. Y. 580.
- Foster v. Newbrough, vol. 66—645. *Affirmed*, 58 N. Y. 481.
- Fraser v. Freeman, vol. 56—234. *Reversed*, 43 N. Y. 566.
- Freeborn v. Wagner, vol. 49—43. *Affirmed*, 4 Keyes, 27.
- Freelove v. Cole, vol. 41—619. *Affirmed*. See 41 N. Y. 619.
- Freeman v. Auld, vol. 37—587. *Overruled*, 44 N. Y. 50.
- Freeman v. Auld, vol. 44—14. *Reversed*, 44 N. Y. 50.
- Freeman v. Freeman, vol. 51—306. *Affirmed*, 43 N. Y. 566.
- Freleigh v. Brink, vol. 30—144. *Reversed*, 22 N. Y. 418.
- French v. New, vol. 20—481. *Reversed*, 28 N. Y. 147.
- Freer v. Stotenbur, vol. 36—641. *Reversed*, 34 How. 440.
- Friery v. People, vol. 54—319. *Affirmed*, 2 Keyes, 424.
- Frith v. Crowell, vol. 5—209. *Overruled*, 2 Sandf. 379.
- Fuller v. Fenner, vol. 16—333. *Overruled*, 17 N. Y. 54.
- Fuller v. Rowe, vol. 59—354. *Reversed*, 57 N. Y. 23.
- Furguson v. Tweedy, vol. 56—168. *Affirmed*, 43 N. Y. 543.

G

- Gage v. Brewster, vol. 30—387. *Affirmed*, 31 N. Y. 218.
- Gage v. Dauchy, vol. 28—622. *Reversed*, 34 N. Y. 293.

- Galwey v. United States Steam Sugar Refining Co., vol. 36—256. *Affirmed*, 21 How. 313.
- Gardner v. Heartt, vol. 2—165. *Reversed*, 1 N. Y. 528.
- Garr v. Selden, vol. 6—416. *Reversed*, 4 N. Y. 91.
- Garvey v. Jarvis, vol. 54—179. *Affirmed*, 46 N. Y. 310.
- Gaskin v. Anderson, vol. 55—259. *Affirmed* at General Term. See *Id.* 262; also in Court of Appeals, 8 Abb., N.S., 312.
- Genet v. Beekman, vol. 27—371. *Affirmed*, 26 N. Y. 35.
- Genet v. Davenport, vol. 66—412. *Affirmed*, 56 N. Y. 676.
- Gerard v. Prouty, vol. 34—454. *Affirmed*, 41 N. Y. 619.
- Germania Bank v. Distler, vol. 67—333. *Affirmed*, 64 N. Y. 642.
- Gerwig v. Shetterly, vol. 64—620. *Reversed*, 56 N. Y. 214.
- Gibert v. Peteler, vol. 38—488. *Affirmed*, 38 N. Y. 165.
- Gibson v. Toby, vol. 53—191. *Reversed*, 46 N. Y. 637.
- Gilchrist v. Brooklyn Grocers' Manuf'g Asso'n, vol. 66—390. *Affirmed*, 59 N. Y. 495.
- Gillet v. Moody, vol. 5—185. *Reversed*, 3 N. Y. 479.
- Gillott v. Esterbrook, vol. 47—455. *Affirmed*, 48 N. Y. 374.
- Gilmore v. Spies, vol. 1—158. *Affirmed*, 1 N. Y. 321.
- Goodwin v. Baltimore & Ohio R. R. Co., vol. 58—195. *Reversed*, 50 N. Y. 154.
- Goold v. Chapin, vol. 10—612. *Reversed*, 20 N. Y. 259.
- Gould v. Gould, vol. 36—270. *Affirmed* at General Term, vol. 41—654; also in Court of Appeals, 41 N. Y. 619.
- Gould v. Town of Venice, vol. 29—442. *Reversed*, 23 N. Y. 439.

- Goulding v. Davidson, vol. 28—438. *Reversed*, 26 N. Y. 604.
- Grand Trunk Railway Co. v. Edwards, vol. 56—408. *Affirmed*. See 6 Albany L. J. 170.
- Grant v. Johnson, vol. 6—337. *Reversed*, 5 N. Y. 247.
- Graves v. Berdan, vol. 28—100. *Affirmed*, 26 N. Y. 498.
- Gray v. City of Brooklyn, vol. 50—365. *Affirmed*, 41 N. Y. 619.
- Gray v. Durland, vol. 50—100. *Affirmed*, 51 N. Y. 424.
- Green v. Clark, vol. 13—57. *Affirmed*, 12 N. Y. 343.
- Green v. Hudson River R. R. Co., vol. 28—9. *Affirmed* at General Term, Id. 22, *note*; also by Court of Appeals, 2 Keyes, 294.
- Green v. Hudson River R. R. Co., vol. 31—260. *Affirmed*, 2 Keyes, 294.
- Green v. Hudson River R. R. Co., vol. 32—25. *Affirmed*, 30 How. 593.
- Gridley v. Gridley, vol. 33—250. *Reversed*, 24 N. Y. 130.
- Griggs v. Griggs, vol. 66—287. *Affirmed*, 56 N. Y. 504.
- Griggs v. Howe, vol. 31—100. *Affirmed*, 2 Keyes, 574.
- Gutchess v. Daniels, vol. 58—401. *Reversed*, 49 N. Y. 605.

H

- Hale v. Hays, vol. 48—574. *Affirmed*, 54 N. Y. 389.
- Hall v. Kellogg, vol. 13—603. *Reversed*, 12 N. Y. 325.
- Hall v. Nelson, vol. 23—88. *Overruled*, 18 N. Y. 57.
- Hall v. Stryker, vol. 29—105. *Reversed*, 27 N. Y. 596.
- Halliday v. Noble, vol. 1—137. *Reversed*, 1 N. Y. 330.

- Halstead *v.* McChesney, vol. 50—34. *Affirmed*, 2 Keyes, 92.
- Hamersley *v.* Mayor &c. of New York, vol. 67—35. *Affirmed*, 56 N. Y. 533.
- Hamilton *v.* Ganyard, vol. 34—204. *Affirmed*, 3 Keyes, 45.
- Hammond *v.* Tillotson, vol. 18—332. *Overruled*, 41 N. Y. 425.
- Happy *v.* Mosher, vol. 47—501. *Reversed*, 48 N. Y. 313.
- Hard *v.* Nearing, vol. 44—472. *Reversed*, 35 N. Y. 302.
- Harris *v.* Harris, vol. 36—88. *Reversed*, 26 N. Y. 433.
- Harris *v.* Slaght, vol. 46—470. *Reversed*, 4 Abb. N. S. 428 ; 4 Trans. Ap. 485.
- Harrison *v.* Harrison, vol. 42—162. *Affirmed*, 36 N. Y. 453.
- Hasbrouck *v.* Hasbrouck, vol. 37—579. *Reversed*, 27 N. Y. 132.
- Havens *v.* Erie Railway Co., vol. 53—258. *Reversed*, 41 N. Y. 296.
- Hawley *v.* Keeler, vol. 62—231. *Affirmed*, 53 N. Y. 123.
- Hay *v.* Cohoes Company, vol. 3—42. *Affirmed*, 2 N. Y. 159.
- Hayner *v.* Fowler, vol. 16—300. *Overruled*, 9 N. Y. 142.
- Heath *v.* Barman, vol. 49—496. *Affirmed*, 50 N. Y. 302, *sub nom.* Heath *v.* Barmore.
- Heeney *v.* Trustees of Brooklyn Benevolent Society, vol. 33—360. *Affirmed*, 39 N. Y. 333.
- Hegeman *v.* Western R. R. Corporation, vol. 16—353. *Affirmed*, 13 N. Y. 9.
- Heinemann *v.* Heard, vol. 58—524. *Reversed*, 50 N. Y. 27.
- Henderson *v.* Marvin, vol. 31—297. *Affirmed*, 11 Abb. 142.

- Herrick v. Woolverton, vol. 42—50. *Reversed*, 41 N. Y. 581.
- Heyward v. Mayor &c. of New York, vol. 8—486. *Affirmed*, 7 N. Y. 314.
- Hickok v. Trustees of Plattsburgh, vol. 15—427. *Reversed*, 16 N. Y. 160.
- Hickox v. Fay, vol. 36—9. *Reversed*, 25 How. 163.
- Hicks v. Dorn, vol. 54—172. *Affirmed*, 42 N. Y. 47; 9 Abb., N.S., 47.
- Higbee v. Guardian Mutual Life Ins. Co., vol. 66—462. *Affirmed*, 53 N. Y. 603.
- Hines v. City of Lockport, vol. 60—378. *Affirmed*, 50 N. Y. 236.
- Hodgkins v. Montgomery County Mutual Ins. Co., vol. 34—213. *Reversed*, 41 N. Y. 620, *note*.
- Hoffman v. Hoffman, vol. 55—269. *Affirmed*, 46 N. Y. 30.
- Holbrook v. Utica & Schenectady R. R. Co., vol. 16—113. *Affirmed*, 12 N. Y. 236.
- Holdane v. Trustees of Village of Cold Spring, vol. 23—103. *Affirmed*, 21 N. Y. 474.
- Holmes v. Carley, vol. 32—440. *Affirmed*, 31 N. Y. 289.
- Holmes v. Davis, vol. 21—265. *Reversed*, 19 N. Y. 488.
- Holmes v. Holmes, vol. 57—304. *Reversed* at General Term, 4 Lans. 388.
- Holmes v. Weed, vol. 19—128. *Modified*, vol. 24—546.
- Holt v. Ross, vol. 59—554. *Affirmed*, 54 N. Y. 472.
- Hooper v. Hudson River Fire Ins Co., vol. 15—413. *Affirmed*, 17 N. Y. 424.
- Hoover v. Greenbaum, vol. 62—188. *Affirmed*, 61 N. Y. 305.
- Hotchkiss v. Artisans' Bank, vol. 42—517. *Affirmed*, 2 Keyes, 564.

- Houghtaling v. Kelderhouse, vol. 2—149. *Affirmed*, 1 N. Y. 530.
- Howe v. Buffalo, N. Y. & Erie R. R. Co., vol. 38—124. *Affirmed*, 37 N. Y. 297; 34 How. 625.
- Howe v. Deuel, vol. 43—504. *Approved*, vol. 52—668.
- Howland v. Edmonds, vol. 33—433. *Reversed*, 24 N. Y. 307.
- Hoyt v. Bonnett, vol. 58—529. *Reversed*, 50 N. Y. 538.
- Hoyt v. Carter, vol. 16—212. *Affirmed* at General Term, Id. 221, *note*.
- Hubbard v. Eames, vol. 22—597. *Affirmed* at General Term, Id. 606.
- Hubbard v. Hubbard, vol. 12—148. *Affirmed*, 8 N. Y. 196.
- Hubbell v. Carpenter, vol. 2—484. *Affirmed*, 5 N. Y. 171.
- Hubbell v. Lerch, vol. 62—295. *Affirmed*, 58 N. Y. 237.
- Hubbell v. Van Schoening, vol. 58—498. *Reversed*, 49 N. Y. 326.
- Hulett v. Swift, vol. 42—230. *Affirmed*, 33 N. Y. 571.
- Hunt v. City of Utica, vol. 23—390. *Affirmed*, 18 N. Y. 442.
- Huntington v. Mather, vol. 2—538. *Overruled*, 2 N. Y. 443.
- Hutchings v. Munger, vol. 41—396. *Affirmed*, 41 N. Y. 155.
- Hyatt v. Bates, vol. 35—308. *Affirmed*, 40 N. Y. 164.
- Hyatt v. Pugsley, vol. 23—285. *Modified*, vol. 33—373.
- Hyatt v. Taylor, vol. 51—632. *Reversed*. See 41 N. Y. 619.
- Hyatt v. Trustees of Village of Rondout, vol. 44—385. *Affirmed*. See 41 N. Y. 619.

Hynds v. Schenectady County Mu. Ins. Co., vol. 16—
119. *Affirmed*, 11 N. Y. 554.

I

Ingalls v. Morgan, vol. 12—578. *Affirmed*, 10 N. 178.
Ingersoll v. Jones, vol. 5—661. *Overruled*, in effect, 4
N. Y. 38.
Ingraham v. Baldwin, vol. 12—9. *Affirmed*, 9 N. Y. 45.
Irving Bank v. Wetherald, vol. 34—323. *Affirmed*, 33
How. 617.

J

Jacobs v. Remsen, vol. 35—384. *Affirmed*, 36 N. Y.
668.
James v. Patten, vol. 8—344. *Reversed*, 6 N. Y. 9.
Jessup v. Hulse, vol. 29—539. *Reversed*, 21 N. Y. 168.
Jewett v. Banning, vol. 23—13. *Affirmed*, 21 N. Y. 27.
Jones v. Bach, vol. 48—568. *Reversed at General Term*,
vol. 54—134.
Johnson v. Rich, vol. 9—680. *Overruled*, vol. 15—112,
122.
Johnson v. Zink, vol. 52—396. *Affirmed*, 51 N. Y. 333.
Joslin v. Cowee, vol. 60—48. *Reversed*, 52 N. Y. 90.
Juliand v. Rathbone, vol. 39—97. *Approved*, 5 Abb.,
N.S., 336; *affirmed*, 39 N. Y. 369.

K

Kayser v. Sichel, vol. 34—84. *Affirmed*, 33 How. 174.
Keeler v. Salisbury, vol. 27—485. *Affirmed*, 33 N. Y.
648.
VOL. LXVII. 40

- Keeney v. Grand Trunk Railway Co., vol. 59—104. *Affirmed*, 47 N. Y. 525.
- Keller v. Philips, vol. 40—390. *Affirmed*, 39 N. Y. 351.
- Kellogg v. Ames, vol. 41—218. *Reversed*, 41 N. Y. 259.
- Kellogg v. Olmsted, vol. 28—96. *Affirmed*, 25 N. Y. 189.
- Kellogg v. Slawson, vol. 15—56. *Affirmed*, 11 N. Y. 302.
- Kelsey v. Campbell, vol. 38—238. *Explained*, vol. 40—433.
- Kelsey v. Durkee, vol. 33—410. *Reversed*, 37 N. Y. 143.
- Kelsey v. King, vol. 32—410. *Affirmed*, 33 How. 39.
- Kenzel v. Kirk, vol. 37—113. *Affirmed*, 32 How. 269.
- Ketchum v. City of Buffalo, vol. 21—294. *Affirmed* at General Term, Id. 311, *note*; also by Court of Appeals, 14 N. Y. 356.
- King v. Harris, vol. 30—471. *Affirmed*, 34 N. Y. 330.
- King v. Rundle, vol. 15—139. *Overruled*, in part, 8 N. Y. 525.
- King v. Talbot, vol. 50—453. *Modified and affirmed*, 40 N. Y. 76.
- Kinne v. Ford, vol. 52—194. *Affirmed*, 43 N. Y. 587.
- Kinney v. City of Syracuse, vol. 30—349. *Affirmed*, 3 Keyes 110.
- Kinnier v. Kinnier, vol. 53—454. *Affirmed*, 45 N. Y. 535.
- Kinnier v. Kinnier, vol. 58—424. *Affirmed*, 45 N. Y. 535.
- Kneettle v. Newcomb, vol. 31—169. *Affirmed*, 22 N. Y. 249.
- Knight v. Wilcox, vol. 15—279. *Reversed*, 14 N. Y. 413.
- Knight v. Wilcox, vol. 18—212. *Reversed*, 14 N. Y. 413.

Knowlton v. Fitch, vol. 48—593. *Reversed*, 52 N. Y. 288.

Kolgers v. Guardian Life Ins. Co., vol. 58—185. *Reversed*, 57 N. Y. 638.

Kowing v. Manley, vol. 57—479. *Reversed*, 49 N. Y. 192.

Kundolf v. Thalheimer, vol. 17—506. *Reversed*, 14 N. Y. 413.

L

Lampman v. Cochran, vol. 19—388. *Affirmed*, 16 N. Y. 275.

Lanergan v. People, vol. 50—266. *Reversed*, 39 N. Y. 39; 5 Abb., N.S., 113; 6 Trans. Ap. 84.

Langlois v. Buffalo & Rochester R. R. Co., vol. 19—364. *Affirmed* at General Term, Id. 370, *note*.

Lansing v. Carpenter, vol. 23—402. *Affirmed*, 20 N. Y. 447.

Lapham v. Rice, vol. 63—485. *Affirmed*, 55 N. Y. 472.

Lathrop v. Smith, vol. 35—64. *Affirmed*, 24 N. Y. 417.

Laverty v. Moore, vol. 32—347. *Affirmed*, 33 N. Y. 658.

Layman v. Whiting, vol. 20—559. *Approved*, vol. 27—505. Said (*id. ib.*) to have been *affirmed* at General Term.

Leavitt v. Blatchford, vol. 5—9. *Affirmed* in part, and *reversed* in part, 3 N. Y. 19, *sub nom.* Leavitt v. Palmer &c.; where it was decided that the trust deed and accompanying securities were illegal and void, on the ground that they were made in violation of the act of 1840. The other questions which had been discussed in the cause were not decided, but were left to be disposed of in the action in which the receiver was appointed.

- Leavitt v. Thompson, vol. 56—542. *Reversed*, 52 N. Y. 62.
- Le Conteulx v. Board of Supervisors of Erie County, vol. 7—249. *Approved*, 15 N. Y. 454.
- Lee v. Dill, vol. 39—516. *Affirmed*, 41 N. Y. 619.
- Lee v. Selleck, vol. 32—522. *Affirmed*, 33 N. Y. 615.
- Lefler v. Field, vol. 50—407. *Affirmed*, 52 N. Y. 621.
- Leggett v. Bank of Sing Sing, vol. 25—326. *Reversed*, 24 N. Y. 283.
- Leggett v. Hunter, vol. 25—81. *Affirmed*, 19 N. Y. 445.
- Leggett v. Mutual Life Ins. Co. of New York, vol. 64—23. *Reversed*, 53 N. Y. 394.
- Leitch v. Wells, vol. 48—637. *Reversed*, 48 N. Y. 585.
- Lester v. Jewett, vol. 12—502. *Reversed*, 11 N. Y. 453.
- Levy v. Baker, vol. 40—585. *Reversed*, 33 N. Y. 97.
- Lewis v. Greider, vol. 49—606. *Affirmed*, 51 N. Y. 231.
- Lewis v. Lewis, vol. 13—17. *Affirmed* 11, N. Y. 220.
- Linsday v. The People, vol. 67—548. *Affirmed*, 63 N. Y. 143.
- Livingston v. Hollenbeck, vol. 4—9. *Approved*, 15 N. Y. 454.
- Livingston v. Murray, vol. 67—214. *Modified and affirmed*, by Court of Appeals. See 10 Hun, xvii.
- Livingston v. Tanner, vol. 12—481. *Reversed*, 14 N. Y. 64.
- Lockwood v. Thorne, vol. 12—487. *Reversed*, 11 N. Y. 170.
- Long Island R. R. Co. v. Conklin, vol. 32—381. *Affirmed*, 29 N. Y. 572.
- Looney v. Hughes, vol. 30—605. *Affirmed*, 26 N. Y. 514.
- Lorillard v. Silver, vol. 35—132. *Reversed*, 36 N. Y. 578,

- Lorillard v. Town of Monroe, vol. 12—161. *Affirmed*, 11 N. Y. 392.
- Loring v. United States Vulcanized Gutta Percha Co., vol. 30—644. *Reversed* at General Term, vol. 36—329.
- Losee v. Buchanan, vol. 61—86. *Reversed*, 51 N. Y. 476.
- Lott v. Wyckoff, vol. 1—565. *Affirmed*, 2 N. Y. 355.
- Lounsbury v. Purdy, vol. 16—376. *Affirmed*, 18 N. Y. 515.
- Lovett v. Kingsland, vol. 44—560. *Affirmed*, 32 How. 614.
- Low v. Austin, vol. 25—26. *Affirmed*, 20 N. Y. 181.
- Ludlam v. Ludlam, vol. 31—486. *Affirmed*, 26 N. Y. 356.
- Luke v. City of Brooklyn, vol. 43—54. *Affirmed*, 3 Keyes, 445.
- Luling v. Atlantic Mutual Ins. Co., vol. 50—520. *Affirmed*, 51 N. Y. 207.
- Lumbard v. Syracuse &c. R. R. Co., vol. 64—609. *Affirmed*, 62 N. Y. 290.
- Lummis v. Kasson, vol. 43—373. *Approved and followed*. *Dolson v. Kasson*, 3d Dept. Gen. Term, Sept. 1877, BOCKES, J.
- Lyman v. Parsons, vol. 28—564. *Affirmed*, 20 N. Y. 103.
- Lynch v. Livingston, vol. 8—463. *Affirmed*, 6 N. Y. 422.

M

- McBride v. Farmers' Bank of Salem, vol. 25—657. *Affirmed*, 26 N. Y. 450.
- McBride v. Farmers' Bank of Salem, vol. 28—476. *Affirmed*, 24 How. 611, *n*.

- McBurney v. Wellman, vol. 42—390. *Affirmed*, 43 How. 427.
- McCaffrey v. Wooden, vol. 62—316. *Reversed*, 65 N. Y. 459.
- McCartney v. Bostwick, vol. 31—390. *Reversed*, 32 N. Y. 53.
- McClelland v. Remsen, vol. 36—622. *Affirmed*, 33 How. 618.
- McCotter v. Mayor &c. of New York, vol. 35—609. *Affirmed*, 34 How. 626.
- McDermott v. Palmer, vol. 11—9. *Overruled*, 16 N. Y. 681 ; *reversed*, 8 id. 383.
- McGregor v. Comstock, vol. 16—427. *Affirmed*, 17 N. Y. 162.
- McIntyre v. New York Cen. R. R. Co., vol. 47—515. *Affirmed*, 37 N. Y. 287.
- McKineron v. Bliss, vol. 31—180. *Affirmed*, 21 N. Y. 206.
- McKinster v. Babcock, vol. 37—265. *Reversed*, 26 N. Y. 378.
- McMahon v. Allen, vol. 34—56. *Reversed*, 35 N. Y. 403.
- McMaster v. Pres't &c. of Ins. Co. of North America, vol. 64—536. *Affirmed*, 55 N. Y. 222.
- McNaughton v. McNaughton, vol. 41—50. *Affirmed*, 34 N. Y. 201.
- McQueen v. Babcock, vol. 41—337. *Affirmed*, 33 How. 617.
- Magee v. Badger, vol. 30—246. *Affirmed*, 34 N. Y. 247.
- Mahler v. Norwich & New York Transp. Co., vol. 45—226. *Reversed*, 35 N. Y. 352.
- Main v. Cooper, vol. 26—468. *Affirmed*, 25 N. Y. 180.
- Main v. Davis, vol. 32—461. *Affirmed*, 31 How. 639.

- Mallory v. Gillett, vol. 23—610. *Affirmed*, 21 N. Y. 412.
- Mallory v. Norton, vol. 21—424. *Overruled*, virtually, 48 N. Y. 188.
- Mallory v. Tioga R. R. Co., vol. 39—488. *Affirmed*, 32 How. 616.
- Maloney v. Horan, vol. 53—29. *Reversed*, 49 N. Y. 111.
- Mangam v. Brooklyn City R. R. Co., vol. 36—230. *Affirmed*, 38 N. Y. 455.
- Manhattan Oil Co. v. Camden & Amboy R. R. &c. Co., vol. 52—72. *Affirmed*, 54 N. Y. 197.
- Mann v. Fairchild, vol. 5—108. *Reversed* at General Term, vol. 14—548.
- Marine Bank of Chicago v. Van Brunt, vol. 61—361. *Affirmed*, 49 N. Y. 160.
- Marine and Fire Ins. Bank of Georgia v. Jauncey, vol. 1—486. *Overruled*, 3 Sandf. 257.
- Markham v. Jaudon, vol. 49—462. *Reversed*, 41 N. Y. 235.
- Marks v. King, vol. 67—225. *Affirmed*, 64 N. Y. 628.
- Marsh v. Potter, vol. 30—505. *Approved*, vol. 43—298 ; *affirmed*, 24 How. 610.
- Marvin v. Smith, vol. 56—600. *Affirmed*, 46 N. Y. 571.
- Mason v. White, vol. 11—173. *Overruled*, 21 N. Y. 204.
- Mathews v. Howard Ins. Co., vol. 13—234. *Reversed*, 11 N. Y. 9.
- Matteawan Co. v. Bentley, vol. 13—641. *Overruled*, 23 N. Y. 264.
- Matter of Austin, vol. 44—434. *Reversed*, 42 N. Y. 155.
- Matter of Bangs, vol. 15—264. *Reversed*, 12 N. Y. 477.
- Matter of Bassford, vol. 63—161. *Affirmed*, 50 N. Y. 509.

- Matter of Bird v. Steamboat Josephine, vol. 50—501.
Reversed, 39 N. Y. 19.
- Matter of Bonaffe, vol. 33—469. *Affirmed*, 23 N. Y. 169.
- Matter of Bornsdorff v. Lord, vol. 41—211. *Limited*,
53 N. Y. 1; *overruled*, 64 Barb. 506; 46 N. Y. 200.
- Matter of Coates, vol. 13—452. *Reversed*. See 3 Abb.
Dec. 231; 1 Bright. Dig. xxvi.
- Matter of Diez, vol. 56—591. *Affirmed*, 50 N. Y. 88.
- Matter of Douglass, vol. 58—174. *Reversed*, 46 N. Y. 42.
- Matter of Eager, vol. 58—557. *Affirmed*, 46 N. Y. 100.
- Matter of Excelsior Ins. Co., vol. 38—297. *Affirmed*,
25 How. 501, *n*.
- Matter of Fox's will, probate of, vol. 63—157. *Affirmed*,
52 N. Y. 530.
- Matter of Law Graduates of University of New York,
vol. 31—353. *Overruled*, 22 N. Y. 67.
- Matter of Marty, vol. 2—436. *Affirmed* at General
Term, vol. 3—229.
- Matter of New York Cen. R. R. Co. v. Buffalo, N. Y. &
Erie R. R. Co., vol. 49—501. *Affirmed*. See 6 Al-
bany L. J. 173.
- Matter of Prot. Epis. Public School &c., vol. 58—161.
Reversed, 46 N. Y. 178.
- Matter of Reciprocity Bank, vol. 29—369. *Reversed*, 22
N. Y. 9.
- Matter of Smith, vol. 65—263. *Reversed*, 52 N. Y. 526.
- Matthews v. Coe, vol. 56—430. *Reversed*, 49 N. Y. 57.
- Matthews v. Duryee, vol. 45—69. *Affirmed*, 4 Keyes,
525.
- Mattice v. Allen, vol. 33—543. *Reversed*, 33 How. 619.
- Mayer v. Mayor &c. of New York, vol. 67—323. *Af-
firmed*, 63 N. Y. 455.
- Mayor &c. of New York v. Second Av. R. R. Co., vol.
34—41. *Affirmed*, 32 N. Y. 261.

- Mead v. Case, vol. 33—202. *Questioned*, 65 N. Y. 363.
- Mechanics' Bank v. Edwards, vol. 1—271. *Affirmed* at General Term, vol. 2—545.
- Mechanics' Bank v. Livingston, vol. 33—458. *Affirmed* at General Term, Id. 465.
- Mechanics' & Farmers' Bank of Albany v. Wixon, vol. 46—218. *Affirmed*, 42 N. Y. 438.
- Mechanics' & Traders' Bank of Jersey City v. Dakin, vol. 50—587. *Reversed*, 51 N. Y. 519.
- Mendenhall v. Klinck, vol. 50—634. *Affirmed*, 51 N. Y. 246.
- Merrick v. Brainard, vol. 38—574. *Affirmed* as to one defendant, and *reversed* as to the other, 34 N. Y. 208.
- Merrill v. Green, vol. 66—582. *Affirmed*, 55 N. Y. 270.
- Merritt v. Carpenter, vol. 30—61. *Reversed*, 33 How. 420.
- Merritt v. Earle, vol. 31—38. *Affirmed*, 29 N. Y. 115.
- Methodist Episcopal Union Church v. Pickett, vol. 23—436. *Affirmed*, 19 N. Y. 436.
- Meyer v. Huneke, vol. 65—304. *Reversed*, 55 N. Y. 412.
- Meyer v. Lent, vol. 16—538. *Reversed*, 7 Ab. Pr. 225.
- Meyer v. Peck, vol. 33—532. *Affirmed*, 26 How. 601.
- Middlebrook v. Merchants' Bank, vol. 41—481. *Affirmed*, 3 Keyes, 135.
- Mier v. Cartledge, vol. 8—75. *Approved*, 6 How. Pr. 360, *note*; *Questioned*, 9 id. 57, 215, 216.
- Milburn v. Belloni, vol. 34—607. *Reversed*, 39 N. Y. 53.
- Milbau v. Sharp, vol. 15—193. *Affirmed*, 27 N. Y. 611.
- Milbau v. Sharp, vol. 17—435. *Affirmed* at General Term, vol. 28—228.
- Milbau v. Sharp, vol. 28—228. *Affirmed*, 27 N. Y. 611.
- Miller v. Irish, vol. 67—256. *Affirmed*, 63 N. Y. 652.
- Miller v. Pres't &c. of Junction Canal Co., vol. 53—590. *Affirmed*, 41 N. Y. 98.

- Miller v. White, vol. 57—504. *Reversed*, 50 N. Y. 137.
- Mills v. Mills, vol. 36—474. *Affirmed*, 40 N. Y. 543.
- Mills v. Stewart, vol. 62—444. *Affirmed*, 41 N. Y. 384.
- Minnesota Cen. Railway Co. v. Morgan, vol. 52—217. *Affirmed*. See 6 Albany L. J. 173.
- Mitchell v. Bartlett, vol. 52—319. *Affirmed*, 51 N. Y. 447.
- Mitchell v. Cook, vol. 29—243. *Affirmed*, 26 How. 599.
- Mitchell v. Read, vol. 61—310. *Reversed*, 61 N. Y. 123.
- Montgomery County Bank v. Albany City Bank *et al.*, vol. 8—396. *Affirmed* as to one defendant, and *reversed* as to the other, 7 N. Y. 459.
- Moody v. Osgood, vol. 60—644. *Affirmed*, 54 N. Y. 488.
- Moore v. Cross, vol. 23—534. *Affirmed*, 19 N. Y. 227.
- Moore v. Moore, vol. 47—257. *Affirmed*. See 6 Albany L. J. 173.
- Morey v. Town of Newfane, vol. 8—645. *Overruled*, 37 N. Y. 568.
- Morey v. Farmers' Loan & Trust Co., vol. 18—401. *Reversed*, 14 N. Y. 302.
- Morey v. Webb, vol. 65—22. *Affirmed*, 58 N. Y. 351.
- Morgan v. Avery, vol. 7—656. *Affirmed* at General Term, Id. 667, *note*. *Approved*, vol. 13—412. *Overruled*, in part, 44 N. Y. 271.
- Morgan v. King, vol. 18—277. *Affirmed* at General Term, vol. 30—9. *Reversed*, 35 N. Y. 454.
- Morgan v. King, vol. 30—9. *Reversed*, 35 N. Y. 454.
- Morgan v. Skidmore, vol. 55—263. *Affirmed*, except as to costs. See Alb. L. J. 173.
- Morrell v. Morrell, vol. 1—318. *Reversed* at General Term, vol. 3—236.
- Morse v. Cloyes, vol. 11—100. *Reversed*. See Seld. Notes, 198; 1 Bright. Dig. LXI.
- Mosely v. Marshall, vol. 27—42. *Reversed*, 22 N. Y. 200.

- Moshier v. Utica & Schenectady R. R. Co., vol. 8—427.
Overruled, vol. 23—653.
- Moss v. McCullough, vol. 7—279. *Overruled*, 50 N. Y. 137.
- Mowrey v. Central City Railway, vol. 66—43. *Affirmed*, 51 N. Y. 666.
- Moyer v. Hinman, vol. 17—137. *Modified*, 13 N. Y. 180.
- Munro v. Merchant, vol. 26—383. *Reversed*, 28 N. Y. 9.
- Murdock v. Aikin, vol. 29—59. *Affirmed*, 25 How. 594, *n*.
- Murdock v. Harris, vol. 20—407. *Reversed*, 18 N. Y. 28.
- Murray v. Harison, vol. 47—484. *Affirmed* at General Term, vol. 52—427; 5 Abb., N.S., 236.
- Myers v. Burns, vol. 33—401. *Affirmed*, 35 N. Y. 269.
- Myers v. Davis, vol. 26—367. *Reversed*, 22 N. Y. 489.

N

- National Park Bank of New York v. Ninth Nat. Bank, vol. 55—87. *Reversed*, 46 N. Y. 77.
- Nellis v. McCarn, vol. 35—115. *Overruled*, on one point, vol. 44—120.
- Newman v. Alvord, vol. 49—588. *Affirmed*, 51 N. Y. 189.
- New York Central Ins. Co. v. Nat. Protection Ins. Co., vol. 20—468. *Reversed*, 14 N. Y. 85.
- New York Guaranty and Indemnity Co. v. Flynn, vol. 65—365. *Affirmed*, 56 N. Y. 653.
- New York & Harlem R. R. Co. v. Forty-Second Street &c. R. R. Co., vol. 50—285. *Affirmed* at General Term, Id. 309.
- New York & Harlem R. R. Co. v. Story, vol. 6—419. *Reversed*, 6 N. Y. 85.
- New York Life Ins. & Trust Co. v. Covert, vol. 29—435. *Reversed*, 6 Abb. N. Y. 154; 33 How. 619.

- New York Life Ins. and Trust Co. v. Staats, vol. 21—571. *Affirmed*, 17 N. Y. 469.
- New York & New Haven R. R. Co. v. Schuyler, vol. 38—534. *Affirmed*, 34 N. Y. 30.
- Niblo v. Binsse, vol. 44—54. *Reversed*, 1 Keyes, 476.
- Nichols v. McEwen, vol. 21—65. *Affirmed*, 17 N. Y. 22.
- Nicoll v. New York & Erie R. R. Co., vol. 12—460. *Affirmed*, 12 N. Y. 121.
- Norris v. Beyea, vol. 15—416. *Reversed*, 13 N. Y. 273.
- Northrop v. Hill, vol. 61—136. *Affirmed*, 57 N. Y. 351.

O

- O'Brien v. People, vol. 48—274. *Affirmed*, 36 N. Y. 276.
- Ogden v. Jennings, vol. 66—301. *Affirmed*, 62 N. Y. 526.
- O'Hara v. Dever, vol. 46—609. *Affirmed*, 2 Keyes, 558; 2 Abb., N.S., 418.
- Olcott v. Robinson, vol. 20—148. *Reversed*, 21 N. Y. 150.
- Olcott v. Tioga R. R. Co., vol. 26—147. *Reversed*, 20 N. Y. 210.
- Olcott v. Tioga R. R. Co., vol. 40—179. *Affirmed*, 27 N. Y. 546.
- Olcott v. Wood, vol. 15—644. *Affirmed*, 14 N. Y. 32.
- Olmsted v. Brown, vol. 12—657. *Overruled*, 17 N. Y. 442.
- Olmsted v. Harvey, vol. 1—102. *Affirmed*, 1 N. Y. 483.
- Olmsted v. Loomis, vol. 6—152. *Reversed*, 9 N. Y. 423.
- Olyphant v. McNair, vol. 41—446. *Affirmed*. See 41 N. Y. 619.
- Ombony v. Jones, vol. 21—520. *Affirmed*, 19 N. Y. 234.

- Ormsby v. Vermont Copper Mining Co., vol. 65—360.
Reversed, 56 N. Y. 623.
- Orr v. Bigelow, vol. 20—21. *Affirmed*, 14 N. Y. 556.
- Osborn v. Robbins, vol. 37—481. *Reversed*, 36 N. Y. 365.
- Osbreys v. Reimer, vol. 49—265. *Modified and affirmed*, 51 N. Y. 630.
- Osgood v. Maguire, vol. 61—54. *Affirmed*, 61 N. Y. 524.
- Osgood v. Strauss, vol. 65—383. *Affirmed*, 55 N. Y. 672.
- Ott v. Schrœppel, vol. 7—431. *Reversed*, 5 N. Y. 482.
- Overbagh v. Patrie, vol. 8—28. *Affirmed*, 6 N. Y. 510.
- Owen v. Cawley, vol. 42—105. *Affirmed*, 36 N. Y. 600.

P

- Palen v. Johnson, vol. 46—21. *Affirmed*, 50 N. Y. 49.
- Palmer v. Avery, vol. 41—290. *Affirmed*. See 41 N. Y. 619.
- Pardee v. Fish, vol. 67—407. *Affirmed* at a Gen. Term, Id. 410, note *a*; also by Court of Appeals, 60 N. Y. 265.
- Pardee v. Van Anken, vol. 3—534. *Overruled*, 42 N. Y. 89.
- Parish of Bellport v. Tooker, vol. 29—256. *Affirmed*, 21 N. Y. 267.
- Parish v. Parish, vol. 42—274. *Affirmed*, 25 N. Y. 9.
- Parker v. Rensselaer & Saratoga R. R. Co., vol. 16—315. *Overruled*, it seems, 38 N. Y. 433.
- Parks v. Comstock, vol. 59—16. *Affirmed* by Court of Appeals. See Id. 37, note.
- Parmelee v. Oswego & Syracuse R. R. Co., vol. 7—599. *Affirmed*, 6 N. Y. 74.
- Parshall v. Eggert, vol. 52—367. *Affirmed*, 54 N. Y. 18.

- Partridge v. Colby, vol. 19—248. *Overruled*, vol. 23—584. *Approved* and followed, 29 N. Y. 400.
- Passenger v. Thorburn, vol. 35—17. *Affirmed*, 34 N. Y. 634.
- Patchen v. Devin, vol. 37—430. *Affirmed* in part, and *reversed* in part, 26 N. Y. 441.
- Patterson v. People, vol. 46—625. *Overruled*, in part, 42 N. Y. 8.
- Payne v. Slate, vol. 39—634. *Affirmed*, 29 N. Y. 146.
- Peck v. Village of Batavia, vol. 32—634. *Approved*, 32 N. Y. 497.
- Pell v. Ulmar, vol. 21—500. *Reversed*, 18 N. Y. 139.
- People v. Adirondack Co., vol. 57—656. *Affirmed*. See 6 Albany L. J. 174.
- People v. Albany & Susquehanna R. R. Co., vol. 57—204.
- People v. American Art Union, vol. 13—577. *Affirmed*, 7 N. Y. 228.
- People v. Bostwick, vol. 43—9. *Affirmed*, 32 N. Y. 445.
- People v. Bowen, vol. 30—24. *Reversed*, 21 N. Y. 517.
- People v. Burrows, vol. 27—575. *Affirmed*, 18 N. Y. 315.
- People v. Central R. R. of New Jersey, vol. 48—478. *Reversed*, 42 N. Y. 283.
- People v. Cook, vol. 14—259. *Affirmed*, 8 N. Y. 67.
- People v. Davis, vol. 45—494. *Affirmed*, 33 How. 442 ; 1 Trans. Ap. 8.
- People v. Felton, vol. 36—429. *Affirmed*, 29 How. 575.
- People v. Ingersoll, vol. 67—472. *Affirmed* at General Term, Id. 486, note *a*; and the latter decision *affirmed* by Court of Appeals, after a re-argument, 58 N. Y. 1. The legislature subsequently passed an act authorizing the People of the state to sue, in cases of this nature. (Laws of 1875, chap. 49.)

- People v. Kerr, vol. 37—357. *Affirmed*, 27 N. Y. 188;
25 How. 258.
- People v. Lohman; vol. 2—216. *Affirmed*, 1 N. Y. 379.
- People v. McCumber, vol. 27—632. *Affirmed*, 18 N. Y.
315.
- People v. Mayor &c. of New York, vol. 28—240. *Re-
versed*, 10 Abb. 111.
- People v. Molyneux, vol. 53—9. *Affirmed*, 40 N. Y. 113.
- People v. Moring, vol. 47—642. *Reversed*, 3 Keyes, 374.
- People v. New York Central R. R. Co., vol. 25—199.
Affirmed, 13 N. Y. 78.
- People v. New York Central R. R. Co., vol. 34—123.
Affirmed, 24 N. Y. 485.
- People v. Northern R. R. Co., vol. 53—98. *Affirmed*,
42 N. Y. 217.
- People v. Northrup, vol. 50—147. *Reversed*, 37 N. Y.
203.
- People v. Powers, vol. 7—462. *Affirmed*, 6 N. Y. 50.
- People v. Rector &c. of Trinity Church, vol. 30—537.
Affirmed, 22 N. Y. 44.
- People v. Snyder, vol. 51—589. *Affirmed*, 41 N. Y.
397.
- People v. Third Av. R. R. Co., vol. 45—63. *Affirmed*,
31 How. 63.
- People v. Vanderbilt, vol. 38—282. *Affirmed*, 26 N. Y.
287.
- People v. Van Rensselaer, vol. 8—189. *Reversed*, 9
N. Y. 291.
- People v. Walker, vol. 21—630. *Reversed*, 17 N. Y.
502.
- People v. White, vol. 11—26. *Overruled*, 11 N. Y. 308.
- People v. White, vol. 55—606. *Affirmed*, 32 N. Y. 465.
- People *ex rel.* Akin v. Morgan, vol. 65—473. *Reversed*,
55 N. Y. 587.

- People *ex rel.* Albany & Susquehanna R. R. Co. *v.* Mitchell, vol. 45—208. *Affirmed*, 35 N. Y. 551.
- People *ex rel.* Baldwin *v.* Board of Supervisors of Livingston County, vol. 26—118. *Reversed*, 17 N. Y. 486.
- People *ex rel.* Bank of Commerce *v.* Commissioners of Taxes &c., vol. 40—334. *Reversed* by Court of Appeals; but *affirmed* by Supreme Court of the U. S., 2 Wal. 200; 2 Black, 620.
- People *ex rel.* Bank of the Commonwealth *v.* Commissioners of Assessments &c., vol. 32—509. *Affirmed*, 23 N. Y. 192.
- People *ex rel.* Barbour *v.* Gates, vol. 57—291. *Reversed*, 43 N. Y. 40.
- People *ex rel.* Blossom *v.* Nelson, vol. 60—159. *Reversed*, 46 N. Y. 477.
- People *ex rel.* Bullard *v.* Contracting Board, vol. 33—510. *Affirmed*, 28 How. 583.
- People *ex rel.* Bullard *v.* Powers, vol. 35—105. *Overruled*, 1 Thomp. & C. 1.
- People *ex rel.* Central Bank of Cherry Valley *v.* Board of Supervisors of Otsego County, vol. 53—564. *Affirmed*, 51 N. Y. 401.
- People *ex rel.* Com'rs for erection of a Market *v.* Common Council of New York, vol. 45—473. *Affirmed*, 3 Keyes 81.
- People *ex rel.* Cook *v.* Board of Police, vol. 40—626. *Affirmed*, 39 N. Y. 506.
- People *ex rel.* Crane *v.* Ryder, vol. 16—370. *Reversed*, 12 N. Y. 433.
- People *ex rel.* Crowell *v.* Lawrence, vol. 36—177. *Affirmed*, 41 N. Y. 137.
- People *ex rel.* Debenetti *v.* Gale, vol. 22—502. *Affirmed*, 3 Abb. 309.
- People *ex rel.* Dennis *v.* Brennan, vol. 45—457. See

- S.C. 30 How. 417. The opinion there reported is a dissenting opinion.
- People *ex rel.* Duff *v.* Booth, vol. 49—31. This was a Special Term decision. See vol. 50—IV.
- People *ex rel.* Dunn *v.* Board of Police &c., vol. 35—644. *Reversed*, 24 How. 611.
- People *ex rel.* Erie Railway Co. *v.* Beardsley, vol. 52—105. *Affirmed*. See 41 N. Y. 619.
- People *ex rel.* Erie & Genesee Valley R. R. Co. *v.* Tubbs, vol. 59—401. *Affirmed*, 49 N. Y. 356.
- People *ex rel.* Furman *v.* Clute, vol. 63—356. *Reversed*, 50 N. Y. 451.
- People *ex rel.* Gorman *v.* Board of Police &c., vol. 35—527. *Reversed*. See 24 How. 611; 1 Bright. Dig. LXVIII.
- People *ex rel.* Griffing *v.* Mayor &c. of Brooklyn, vol. 9—535. *Reversed*, 4 N. Y. 419.
- People *ex rel.* Hanrahan *v.* Board of Police &c., vol. 35—644. *Reversed*, 26 N. Y. 316.
- People *ex rel.* Hope *v.* Board of Police &c., vol. 35—527. *Reversed*. See 24 How. 611; 1 Bright. Dig. LXVIII.
- People *ex rel.* Howard *v.* Newell, vol. 13—86. *Reversed*, 7 N. Y. 9.
- People *ex rel.* Inman *v.* Board of Town Auditors of Westford, vol. 53—555. *Affirmed*. See 41 N. Y. 619.
- People *ex rel.* Kellogg *v.* Schuyler, vol. 5—166. *Reversed*, 4 N. Y. 173.
- People *ex rel.* Lefever *v.* Board of Supervisors of Ulster County, vol. 32—473. *Reversed*, 34 N. Y. 268.
- People *ex rel.* Lockwood *v.* Scrugham, vol. 20—302. *Reversed* at General Term, vol. 25—216.
- People *ex rel.* McConvill *v.* Hills, vol. 46—340. *Reversed*, 35 N. Y. 449.

- People *ex rel.* Mathews v. Toynbee, vol. 20—168. *Affirmed*, 13 N. Y. 378.
- People *ex rel.* Matthews v. Roberts, vol. 43—168. *Affirmed*, 38 N. Y. 451.
- People *ex rel.* Merriam v. Schoonmaker, vol. 19—657. *Reversed*, 13 N. Y. 238.
- People *ex rel.* Mitchell v. Simpson, vol. 37—432. *Affirmed*, 28 N. Y. 55.
- People *ex rel.* Mutual Life Ins. Co. of New York v. Board of Supervisors of New York, vol. 20—81. *Affirmed*, 16 N. Y. 424.
- People *ex rel.* Odle v. Kniskern, vol. 50—87. *Reversed*, 54 N. Y. 52.
- People *ex rel.* Ottman v. Com'rs of Highways of town of Seward, vol. 27—94. *Affirmed*, 30 N. Y. 470.
- People *ex rel.* Peck v. Board of Police &c., vol. 35—651. *Reversed*, 24 How. 611.
- People *ex rel.* Phenix Fire Ins. Co. v. Gardiner, vol. 48—608. *Overruled*, 7 Wal. (U.S.) 16.
- People *ex rel.* Post v. Mayor &c. of Brooklyn, vol. 6—209. *Reversed*, 4 N. Y. 419. MORSE and McCOUN, JJ., although concurring in reversing for irregularity, did not assent to the opinion delivered by BARCULO, J. See 9 Barb. 579, *note*.
- People *ex rel.* Reilly v. Johnson, vol. 37—502. *Affirmed*, 38 N. Y. 63.
- People *ex rel.* Robinson v. Ferris, vol. 41—121. *Reversed*, 36 N. Y. 218.
- People *ex rel.* Smith v. Pease, vol. 30—588. *Affirmed*, 27 N. Y. 45.
- People *ex rel.* Son v. Miner, vol. 32—612, *Reversed* at General Term, vol. 37—466.
- People *ex rel.* Stephens v. Halsey, vol. 53—547. *Affirmed*, 37 N. Y. 344, 349. But the Court of Appeals did not pass upon the question whether the statement

furnished by the agent, to the assessors, was conclusive as to the amount to be taxed. See vol. 53—555, *note*.

People *ex rel.* Titus v. Board of Police &c., vol. 35—535. *Reversed*, 24 How. 611.

People *ex rel.* Vassar v. Berberich, vol. 20—168. *Affirmed*, 13 N. Y. 378.

People *ex rel.* White v. Hulbert, vol. 59—446. *Reversed*, 46 N. Y. 110.

People *ex rel.* Wilcox v. Wilcox, vol. 22—178. *Affirmed*, 14 N. Y. 575.

People *ex rel.* Williamson v. Allen, vol. 42—203. *Reversed*, 32 N. Y. 355.

People *ex rel.* Wood v. Draper, vol. 25—344. *Affirmed*, 15 N. Y. 532.

Perkins v. Giles, vol. 53—342. *Affirmed*, 50 N. Y. 228.

Perrin v. New York Cen. R. R. Co., vol. 40—65. *Affirmed*, 41 N. Y. 619.

Phenix Bank of New York v. Donnell, vol. 41—571. *Affirmed*, 40 N. Y. 410.

Phillips v. People, vol. 57—353. *Modified and affirmed*, 42 N. Y. 200.

Phillips v. Rensselaer & Saratoga R. R. Co., vol. 57—644. *Reversed*, 49 N. Y. 177.

Pickett v. King, vol. 34—193. *Affirmed*, 34 N. Y. 175.

Pike v. Butler, vol. 4—650. *Reversed*, 4 N. Y. 360.

Pitt v. Davison, vol. 37—97. *Reversed*, 37 N. Y. 235; 34 How. 355.

Pitts v. Pitts, vol. 64—482. *Affirmed*, 52 N. Y. 593.

Pixley v. Clark, vol. 32—268. *Reversed*, 35 N. Y. 520.

Place v. Butternuts Woolen &c. Manufacturing Co., vol. 28—503. *Reversed*. See 26 How. 601, *note*.

Pollitt v. Long, vol. 58—20. *Reversed*, 56 N. Y. 208.

- Pope v. Bank of Albion, vol. 59—226. *Reversed*, 57 N. Y. 126.
- Pope v. Cole, vol. 64—406. *Affirmed*, 55 N. Y. 124.
- Post v. Hover, vol. 30—312. *Affirmed*, 33 N. Y. 593.
- Potter v. Thompson, vol. 22—87. *Overruled*, 38 N. Y. 178.
- Poughkeepsie & Salt Point Plank Road Co. v. Griffin, vol. 21—454. *Reversed*, 24 N. Y. 150.
- Powers v. Shepard, vol. 49—418. *Affirmed*, 48 N. Y. 540.
- Pratt v. New York Central Ins. Co., vol. 64—589. *Affirmed*, 55 N. Y. 505.
- Pratt v. Peckham, vol. 25—195. *Overruled*, vol. 41—370.
- President &c. of Agawam Bank v. Strever, vol. 16—82. *Overruled*, 18 N. Y. 502.
- Price v. Lyons Bank, vol. 30—85. *Reversed*, 33 N. Y. 55.
- Price v. Oswego & Syracuse R. R. Co., vol. 58—599. *Reversed*, 50 N. Y. 213.
- Pugsley v. Aikin, vol. 14—114. *Reversed*, 11 N. Y. 494.
- Pullman v. Corning, vol. 14—174. *Affirmed*, 9 N. Y. 93.
- Pullman v. Mayor &c. of New York, vol. 54—169. *Reversed*, 2 Abb., N.S., 29.
- Pulver v. Harris, vol. 62—500. *Affirmed*, 52 N. Y. 73.
- Purdy v. Peters, vol. 35—239. *Affirmed*, 27 How. 600.

Q

- Quin v. Skinner, vol. 49—128. *Reversed*, 43 N. Y. 99.

R

- Rainsford v. Rainsford, vol. 57—58. *Affirmed*. See 6 Albany L. J. 175.
- Ramson v. Mayor &c. of New York, vol. 24—226. *Approved*, 5 Abb. 41; 15 How. Pr. 145.
- Rathbone v. McConnell, vol. 20—311. *Affirmed*, 21 N. Y. 466.
- Rathbun v. Platner, vol. 18—272. *Affirmed* by Court of Appeals. See vol. 46—157, per BALCOM, J.
- Rawls v. American Life Ins. Co., vol. 36—357. *Affirmed*, 27 N. Y. 282.
- Raynor v. Robinson, vol. 36—128. *Reversed*, 28 N. Y. 494.
- Real v. People, vol. 55—551. *Affirmed*, 42 N. Y. 270. See concurring opinion of BARNARD, J., and dissenting opinion of CARDOZO, J., 8 Abb., N.S., 324, 325.
- Redmond v. Liverpool &c. Steamship Co., vol. 56—320. *Reversed*, 46 N. Y. 578.
- Reed v. New York Cen. R. R. Co., vol. 56—498. *Reversed*, 45 N. Y. 575.
- Reeves v. Kimball, vol. 63—120. *Affirmed*, 40 N. Y. 299.
- Reformed Prot. Dutch Church v. Brown, vol. 29—335. *Affirmed*, 24 How. 26.
- Reid v. McNaughton, vol. 15—168. *Reversed*, 18 N. Y. 561.
- Relyea v. Beaver, vol. 34—547. *Affirmed*, 25 N. Y. 123.
- Remsen v. People, vol. 57—324. *Reversed*, 43 N. Y. 6.
- Reno v. Pinder, vol. 24—423. *Reversed*, 25 N. Y. 170.
- Rexford v. Knight, vol. 15—627. *Affirmed*, 11 N. Y. 308.
- Rice v. Ehle, vol. 65—185. *Reversed*, 55 N. Y. 518.
- Rich v. Milk, vol. 20—616. *Overruled*, 35 N. Y. 274.
- Richards v. Warring, vol. 39—42. *Affirmed*, 1 Keyes, 576.

- Richmondville Union Seminary &c. v. Brownell, vol. 37—535. *Affirmed*, 34 N. Y. 379.
- Richter v. Poppenhusen, vol. 57—309. *Affirmed*, 42 N. Y. 373.
- Rider v. Hulse, vol. 33—284. *Affirmed*, 24 N. Y. 372.
- Rider v. Pond, vol. 18—179. *Reversed*, 19 N. Y. 262.
- Riley v. City of Rochester, vol. 56—559. *Reversed*, 46 N. Y. 444.
- Ripley v. Ætna Ins. Co., vol. 29—552. *Reversed*, 30 N. Y. 136.
- Roach v. La Farge, vol. 43—616. *Limited*, 53 N. Y. 1; *overruled*, 46 id. 200; 64 Barb. 506.
- Robbins v. Dillaye, vol. 33—77. *Affirmed*, 2 Keyes, 506.
- Robbins v. Gorham, vol. 26—586. *Affirmed*, 25 N. Y. 588.
- Roberts v. Berdell, vol. 61—37. *Affirmed*, 52 N. Y. 644.
- Roberts v. Fisher, vol. 53—69. *Reversed*, 43 N. Y. 159.
- Robertson v. Bullions, vol. 9—64. *Affirmed*, 11 N. Y. 243.
- Robertson v. Caw, vol. 3—410. *Reversed*, 5 N. Y. 125.
- Robinson v. Dauchy, vol. 3—20. *Overruled*, 23 N. Y. 252.
- Robinson v. Gregory, vol. 29—560. *Reversed*. See 30 N. Y. 350; 2 Daly, 399.
- Robinson v. International Life Assur. Society, vol. 52—450. *Affirmed*, 42 N. Y. 54.
- Robinson v. Phillips, vol. 65—418. *Affirmed*, 56 N. Y. 634.
- Robinson v. Wiley, vol. 19—157. *Reversed*, 15 N. Y. 489.
- Rodgers v. Bonner, vol. 55—9. *Affirmed*, 45 N. Y. 379.
- Rodman v. Munson, vol. 13—63. *Affirmed* at General Term, Id. 168.

- Rogers v. McLean, vol. 31—304. *Affirmed*, 34 N. Y. 536.
 Roggen v. Avery, vol. 63—65. *Affirmed*, 65 N. Y. 592.
 Rose v. Baker, vol. 13—230. *Overruled*, 26 N. Y. 404.
 Rose v. Bell, vol. 37—25. *Reversed*, 27 N. Y. 277.
 Ross v. Curtis, vol. 30—238. *Affirmed*, 31 N. Y. 606.
 Ross v. Mather, vol. 47—582. *Reversed*, 51 N. Y. 108.
 Roth v. Wells, vol. 41—194. *Affirmed*, 29 N. Y. 471.
 Rouse v. Whited, vol. 25—279. *Reversed*, 25 N. Y. 170.
 Rowe v. Smith, vol. 55—417. *Affirmed*, 45 N. Y. 230.
 Ruse v. Mutual Benefit Life Ins. Co., vol. 26—556. *Reversed*, 23 N. Y. 516.
 Russell v. Livingston, vol. 19—346. *Reversed*, 16 N. Y. 515.
 Ryan v. Dox, vol. 25—449. *Reversed*, 34 N. Y. 307.

S

- St. John v. St. John's Church, Ithaca, vol. 15—346.
Overruled, 37 N. Y. 297.
 Sanders v. Gillespie, vol. 64—628. *Affirmed*, 59 N. Y. 250.
 Sands v. Kimbark, vol. 39—108. *Affirmed*, 27 N. Y. 147.
 Sands v. New York Life Ins. Co., vol. 59—556. *Affirmed*, 50 N. Y. 626.
 Sands v. St. John, vol. 36—628. *Affirmed*, 29 How. 574.
 Savage v. Putnam, vol. 32—420. *Affirmed*, 32 N. Y. 501.
 Schell v. Erie Railway Co., vol. 51—368. *Explained*, vol. 57—44.
 Schepp v. Carpenter, vol. 49—542. *Affirmed*, 51 N. Y. 602.
 Schneider v. McLane, vol. 36—495. *Affirmed*, 3 Keyes 568.

- Schneider v. McFarland, vol. 4—139. *Affirmed*, 2 N. Y. 459.
- Schoonmaker v. Clearwater, vol. 41—200. *Affirmed*, 1 Keyes, 310.
- Schroeppel v. Corning, vol. 10—576. *Affirmed*, 6 N. Y. 107.
- Schroeppel v. Shaw, vol. 5—580. *Affirmed*, 3 N. Y. 446.
- Schuchardt v. Mayor &c. of New York, vol. 59—295. *Sustained* by judgment for plaintiff, vol. 62—671; *affirmed*, 53 N. Y. 202.
- Scott v. Guernsey, vol. 60—163. *Affirmed*, 48 N. Y. 106.
- Scott v. Tyler, vol. 14—202. *Overruled*, vol. 44—209.
- Scrantom v. Farmers' & Mechanics' Bank of Rochester, vol. 33—527. *Affirmed*, 24 N. Y. 424.
- Sears v. Conover, vol. 34—330. *Affirmed*, 33 How. 334; 3 Keyes, 113.
- Sedgwick v. Stanton, vol. 18—473. *Affirmed*, 14 N. Y. 289.
- Seeley v. Engell, vol. 17—530. *Reversed*, 13 N. Y. 530.
- Seguine v. Seguine, vol. 2—385. *Affirmed* by Court of Appeals, May, 1849.
- Seizer v. Mali, vol. 32—76. *Reversed*, 41 N. Y. 76.
- Selden v. Delaware & Hudson Canal Co., vol. 24—362. *Affirmed*, 29 N. Y. 634.
- Sexton v. Zett, vol. 56—119. *Affirmed*, 44 N. Y. 430.
- Seymour v. Wilson, vol. 16—294. *Reversed*, 15 How. 355; 14 N. Y. 567.
- Shaler & Hall Quarry Co. v. Bliss, vol. 34—309. *Affirmed*, 27 N. Y. 297.
- Sheldon v. Horton, vol. 53—23. *Affirmed*, 43 N. Y. 93.
- Sheldon v. Hudson River R. R. Co., vol. 29—226. *Reversed*, 14 N. Y. 218.
- Sheldon v. Sherman, vol. 42—368. *Affirmed*, 42 N. Y. 484.

- Sheldon v. Wright, vol. 7—39. *Affirmed*, 5 N. Y. 497.
- Shellington v. Howland, vol. 67—14. *Affirmed*, 53 N. Y. 371.
- Sherman v. Rochester & Syracuse R. R. Co., vol. 15—574. *Affirmed*, 17 N. Y. 153.
- Shetterly v. Gerwig, vol. 64—620. *Affirmed*, 56 N. Y. 214.
- Sibell v. Remsen, vol. 30—441. *Affirmed*, 29 How. 574.
- Sieman v. Austin, vol. 33—9. *Affirmed*, 29 N. Y. 615.
- Simmons v. Lee, vol. 66—557. *Affirmed*, 56 N. Y. 676.
- Simmons v. Simmons, vol. 26—68. *Reversed*, 24 How. 611.
- Simpkins v. Low, vol. 49—382. *Affirmed*, 54 N. Y. 179.
- Sixth Avenue R. R. Co. v. Kerr, vol. 45—138. *Affirmed*, 28 How. 383.
- Skinner v. Stuart, vol. 39—206. *Reversed*, 13 Abb. 442.
- Sloan v. Van Wyck, vol. 36—335. *Overruled*, vol. 47—634.
- Slocum v. Hooker, vol. 12—563. *Reversed* at General Term, vol. 13—536.
- Smith v. Felt, vol. 50—612. *Reversed*, 43 N. Y. 419.
- Smith v. Moffat, vol. 1—65. *Reversed*, 4 N. Y. 126.
- Smith v. New York Cen. R. R. Co., vol. 29—132. *Affirmed*, 24 N. Y. 222.
- Smith v. New York Cen. R. R. Co., vol. 43—225. *Affirmed*, 41 N. Y. 620.
- Smith v. Orser, vol. 43—187. *Affirmed*, 42 N. Y. 132.
- Smith v. Wright, vol. 24—170. *Reversed* at General Term, vol. 27—621.
- Spalding v. Hallenbeck, vol. 30—292. *Affirmed*, 35 N. Y. 204.
- Spaulding v. Hallenbeck, vol. 39—79. *Affirmed*, 35 N. Y. 204.

- Spaulding v. Strang, vol. 32—235. *Reversed*, 37 N. Y. 135.
- Spooner v. City of Brooklyn, vol. 31—419. *Reaffirmed*, vol. 36—217.
- Springer v. Dwyer, vol. 58—189. *Reversed*, 50 N. Y. 19.
- Sprong v. Boston & Albany R. R. Co., vol. 60—30. *Affirmed*, 58 N. Y. 56.
- Staats v. Hudson River R. R. Co., vol. 39—298. *Reversed*, 3 Keyes, 196.
- Stanton v. Ellis, vol. 16—319. *Affirmed*, 12 N. Y. 575.
- Stanton v. Kline, vol. 16—9. *Reversed*, 11 N. Y. 196.
- Stanton v. Miller, vol. 65—58. *Reversed*, 58 N. Y. 192.
- Stedman v. Feidler, vol. 25—605. *Affirmed*, 20 N. Y. 437.
- Stephens v. Santee, vol. 51—532. *Reversed*, 49 N. Y. 35.
- Stephens v. Vroman, vol. 18—250. *Reversed*, 16 N. Y. 381.
- Sterling v. Jaudon, vol. 48—459. *Overruled*, 41 N. Y. 243.
- Stewart v. Smith, vol. 39—167. *Affirmed*, 1 Keyes 59; 14 Abb. 75.
- Stokes v. Landgraff, vol. 17—608. *Approved*, 5 Abb., N. S. 217; 7 Bosw. 229; 9 id. 199; 3 Keyes, 596.
- Stone v. Browning, vol. 49—244. *Reversed*, 51 N. Y. 211.
- Stover v. Eyclesheimer, vol. 46—84. *Affirmed*, 3 Keyes, 620.
- Stover v. Flack, vol. 41—162. *Affirmed*, 30 N. Y. 64.
- Stuart v. Kissam, vol. 2—493. *Reversed* at Gen. Term, vol. 11—271.
- Sturges v. Spofford, vol. 52—436. *Reversed*, in part, 45 N. Y. 446.
- Swarthout v. Swarthout, vol. 7—354. *Affirmed*, 5 N. Y. 301.
- Sweet v. Barney, vol. 24—533. *Affirmed*, 23 N. Y. 335.

T

- Tait v. Culbertson, vol. 57—9. *Affirmed*. See 6 Albany L. J., 177.
- Taylor v. Fleet, vol. 1—471. *Reversed* at General Term, vol. 4—471.
- Teall v. Barton, vol. 40—137. *Affirmed*, 25 N. Y. 544.
- Teall v. Felton, vol. 3—512. *Affirmed*, 1 N. Y. 537.
- Tefft v. Munson, vol. 63—31. *Affirmed*, 57 N. Y. 97.
- Terpening v. Skinner, vol. 30—373. *Affirmed*, 29 N. Y. 505.
- Terwilliger v. Brown, vol. 59—9. *Affirmed*, 44 N. Y. 237.
- Thayer v. Clark, vol. 48—243. *Affirmed*, 41 N. Y. 620.
- Thomas v. Achilles, vol. 16—491. *Overruled*, 26 N. Y. 233.
- Thomas v. Clapp, vol. 20—165. *Affirmed*, at General Term, Id. 168, *note*.
- Thompson v. Burhans, vol. 61—260. *Reversed*, 61 N. Y. 52.
- Thompson v. Fargo, vol. 58—575. *Reversed*, 49 N. Y. 188.
- Thompson v. Schermerhorn, vol. 9—152. *Affirmed*, 6 N. Y. 152.
- Thurman v. Wells, vol. 18—500. *Overruled*, in part, 30 N. Y. 594.
- Tillotson v. Hudson River R. R. Co., vol. 15—406. *Affirmed*, 9 N. Y. 575.
- Timon v. Claffy, vol. 45—438. *Affirmed*. See 41 N. Y. 619.
- Tobias v. Ketchum, vol. 36—304. *Reversed*, 32 N. Y. 319.
- Torrey v. Black, vol. 65—414. *Reversed*, 58 N. Y. 185.

- Town of Guilford v. Cornell, vol. 18—815. *Affirmed*, 13 N. Y. 143.
- Townsend v. Hayt, vol. 51—335. *Affirmed*, 51 N. Y. 656.
- Townsend v. McDonald, vol. 14—460. *Reversed*, 12 N. Y. 381.
- Townsend Manuf'g Co. v. Foster, vol. 51—346. *Affirmed*, 41 N. Y. 619.
- Tracy v. Talmage, vol. 18—456. *Modified*, 14 N. Y. 162.
- Tracy v. Troy & Boston R. R. Co., vol. 55—529. *Affirmed*, 38 N. Y. 433.
- Trevor v. Wood, vol. 41—255. *Reversed*, 36 N. Y. 307.
- Trustees &c. of Delhi v. Youmans, vol. 50—316. *Affirmed*, 45 N. Y. 362.
- Trustees of Theological Seminary of Auburn v. Calhoun, vol. 38—148. *Reversed*, 25 N. Y. 422.
- Trustees of Union College v. Wheeler, vol. 59—585. *Affirmed*, 61 N. Y. 88.
- Tucker v. Rankin, vol. 15—471. *Overruled*, 36 N. Y. 441.
- Tucker v. Tucker, vol. 5—99. *Affirmed*, 5 N. Y. 408.
- Turner v. Jaycox, vol. 40—164. *Affirmed*, 40 N. Y. 470.

U

- Underhill v. North American Kerosene Gas Light Co., vol. 36—354. *Affirmed*, 31 How. 34.
- Union Manuf'g Co. v. Lounsbury, vol. 42—125. *Affirmed*, 41 N. Y. 363.

V

- Vail v. Vail, vol. 7—226. *Affirmed* at General Term, vol. 10—69.

- Valton *v.* Nat. Loan Fund Life Assur. Society, vol. 22—9. *Reversed*, 20 N. Y. 32.
- Van Alen *v.* Feltz, vol. 32—139. *Reversed*, 1 Keyes, 332.
- Van Allen *v.* Mooers, vol. 5—110. *Affirmed* at General Term, Id. 114.
- Vanbuskirk *v.* Warren, vol. 34—457. *Affirmed*, 2 Keyes, 119.
- Van Derzee *v.* Van Derzee, vol. 30—331. *Affirmed*, 36 N. Y. 231.
- Van Deusen *v.* Young, vol. 29—9. *Reversed*, 29 N. Y. 9.
- Vandeventer *v.* New York & New Haven R. R. Co., vol. 27—244. *Approved*, vol. 30—107.
- Van Gieson *v.* Van Gieson, vol. 12—520. *Affirmed*, 10 N. Y. 316.
- Van Kleeck *v.* Le Roy, vol. 37—544. *Affirmed*, 34 How. 625.
- Van Rensselaer *v.* Chadwick, vol. 24—333. *Affirmed*, 22 N. Y. 32.
- Van Rensselaer *v.* Smith, vol. 27—104. *Affirmed*, 19 N. Y. 68.
- Van Schaick *v.* Third Avenue R. R. Co., vol. 30—189. *Reversed*, 25 How. 446.
- Van Schaick *v.* Third Av. R. R. Co., vol. 49—409. *Affirmed*, 38 N. Y. 346.
- Van Tuyl *v.* Westchester Fire Ins. Co., vol. 67—72. *Affirmed*, 55 N. Y. 657.
- Varick *v.* Tallman, vol. 2—113. *Approved*, per GRAY J., 5 N. Y. 368.
- Vassar *v.* Camp, vol. 14—341. *Affirmed*, 11 N. Y. 441.
- Vedder *v.* Alkenbrack, vol. 6—327. *Overruled*, 11 N. Y. 281.

Voorhees v. Presbyterian Church of Amsterdam, vol. 8—135. *Affirmed* at General Term, vol. 17—103.

Voorhis v. Baxter, vol. 18—592. *Affirmed*, 17 N. Y. 354.

W

Waddell v. Elmendorf, vol. 12—585. *Affirmed*, 10 N. Y. 170.

Wadsworth v. Murray, vol. 16—601. *Affirmed*, 12 N. Y. 376.

Wadsworth v. Sherman, vol. 14—169. *Affirmed*, 8 N. Y. 388.

Waffle v. Dillenbeck, vol. 39—123. *Affirmed*, 4 Abb., N. S., 457.

Waffle v. New York Cen. R. R. Co., vol. 53—413. *Reversed*, 53 N. Y. 11.

Wagner v. People, vol. 54—367. *Affirmed*, 2 Keyes, 684.

Wait v. Green, vol. 35—535. *Affirmed*, 36 N. Y. 556.

Walker v. Bank of State of New York, vol. 13—636. *Affirmed*, 9 N. Y. 582.

Wall v. Howard Ins. Co., vol. 14—383. *Overruled*, 7 N. Y. 370.

Walsh v. Kelly, vol. 42—98. *Affirmed*, 40 N. Y. 556.

Walton v. Walton, vol. 32—203. *Reversed*, 27 How. 600.

Ward v. Kelsey, vol. 42—582. *Affirmed*, 5 Trans. Ap. 315.

Ward v. Ruckman, vol. 34—419. *Affirmed*, 36 N. Y. 26.

Warner v. Blakeman, vol. 36—501. *Affirmed*, 4 Keyes, 509.

Warner v. Erie Railway Co., vol. 49—558. *Reversed*, 39 N. Y. 468.

- Washington Life Ins. Co. v. Lawrence, vol. 53—307. *Affirmed*. See 41 N. Y. 620.
- Waterbury v. Sinclair, vol. 26—455. *Reversed*, 16 How. Pr. 329.
- Wayne v. Ontario Collegiate Institute, vol. 40—72. *Reversed*, 41 N. Y. 620.
- Wegman v. Childs, vol. 44—403. *Reversed*, 41 N. Y. 159.
- Wells v. Kelsey, vol. 38—242. *Reversed*, 34 How. 626.
- Wells v. Main, vol. 52—263. *Reversed*, 45 N. Y. 327.
- Wendell v. Mayor &c. of Troy, vol. 39—329. *Affirmed*, 4 Keyes, 261.
- Westerlo v. De Witt, vol. 35—215. *Reversed*, 36 N. Y. 340.
- Western Transp'n Co. v. Marshall, vol. 37—509. *Affirmed*, 6 Abb., N.S., 280.
- Wheeler v. Allen, vol. 49—460. *Affirmed*, 51 N. Y. 37.
- Wheeler v. Rochester & Syracuse R. R. Co., vol. 12—227. *Overruled*, 51 N. Y. 568.
- White v. Bullock, vol. 20—91. *Reversed* 15 How. Pr. 102.
- White v. Hackett, vol. 24—290. *Reversed*, 20 N. Y. 178.
- White v. Hicks, vol. 43—64. *Affirmed*, 33 N. Y. 383.
- White v. Howard, vol. 52—294. *Affirmed*, 46 N. Y. 144.
- White v. Wager, vol. 32—250. *Affirmed*, 25 N. Y. 328.
- Whitehead v. Allen, vol. 28—661. *Reversed*, 3 Keyes, 562.
- Whiting v. Barney, vol. 28—393. *Reversed*, 30 N. Y. 330.
- Wibert v. New York & Erie R. R. Co., vol. 19—36. *Overruled*, as to damages, 47 N. Y. 29.
- Wilber v. Sisson, vol. 53—258. *Affirmed*, 54 N. Y. 121.
- Wilds v. Hudson River R. R. Co., vol. 33—503. *Reversed*, 24 N. Y. 430.

- Williams v. Fitzhugh, vol. 44—321. *Modified and affirmed*, 37 N. Y. 444.
- Williams v. Hutchinson, vol. 5—122. *Affirmed* 3 N. Y. 312.
- Williams v. Lawrence, vol. 53—320. *Affirmed*, 47 N. Y. 462.
- Williams v. New York Cen. R. R. Co., vol. 18—222. *Reversed*, 16 N. Y. 97.
- Williams v. People, vol. 45—201. *Affirmed*, 33 N. Y. 688.
- Williams v. Vanderbilt, vol. 29—491. *Affirmed*, 28 N. Y. 217.
- Willis v. Long Island R. R. Co., vol. 32—398. *Affirmed*, 34 N. Y. 670.
- Wilson v. Genesee Mutual Ins. Co., vol. 16—511. *Reversed*, 14 N. Y. 418.
- Winans v. Peebles, vol. 31—371. *Reversed*, 32 N. Y. 423.
- Winchell v. Bowman, vol. 21—448. *Affirmed*, 18 N. Y. 558.
- Winstead Bank v. Webb, vol. 46—177. *Affirmed*, 39 N. Y. 325.
- Wiswall v. McGown, vol. 2—270. *Affirmed*, 10 N. Y. 465.
- Witbeck v. Holland, vol. 55—443. *Affirmed*, 45 N. Y. 13.
- Wolf v. Goodhue Fire Ins. Co., vol. 43—400. *Affirmed*, 41 N. Y. 620.
- Wolfe v. Howes, vol. 24—174. *Affirmed*, 20 N. Y. 197.
- Wooden v. Austin, vol. 51—9. *Affirmed*. See 4 Albany L. J. 113.
- Woodworth v. Bennett, vol. 53—361. *Reversed*, 43 N. Y. 273.
- Wray v. Rhinelander, vol. 52—553. *Affirmed*. See 41 N. Y. 619.

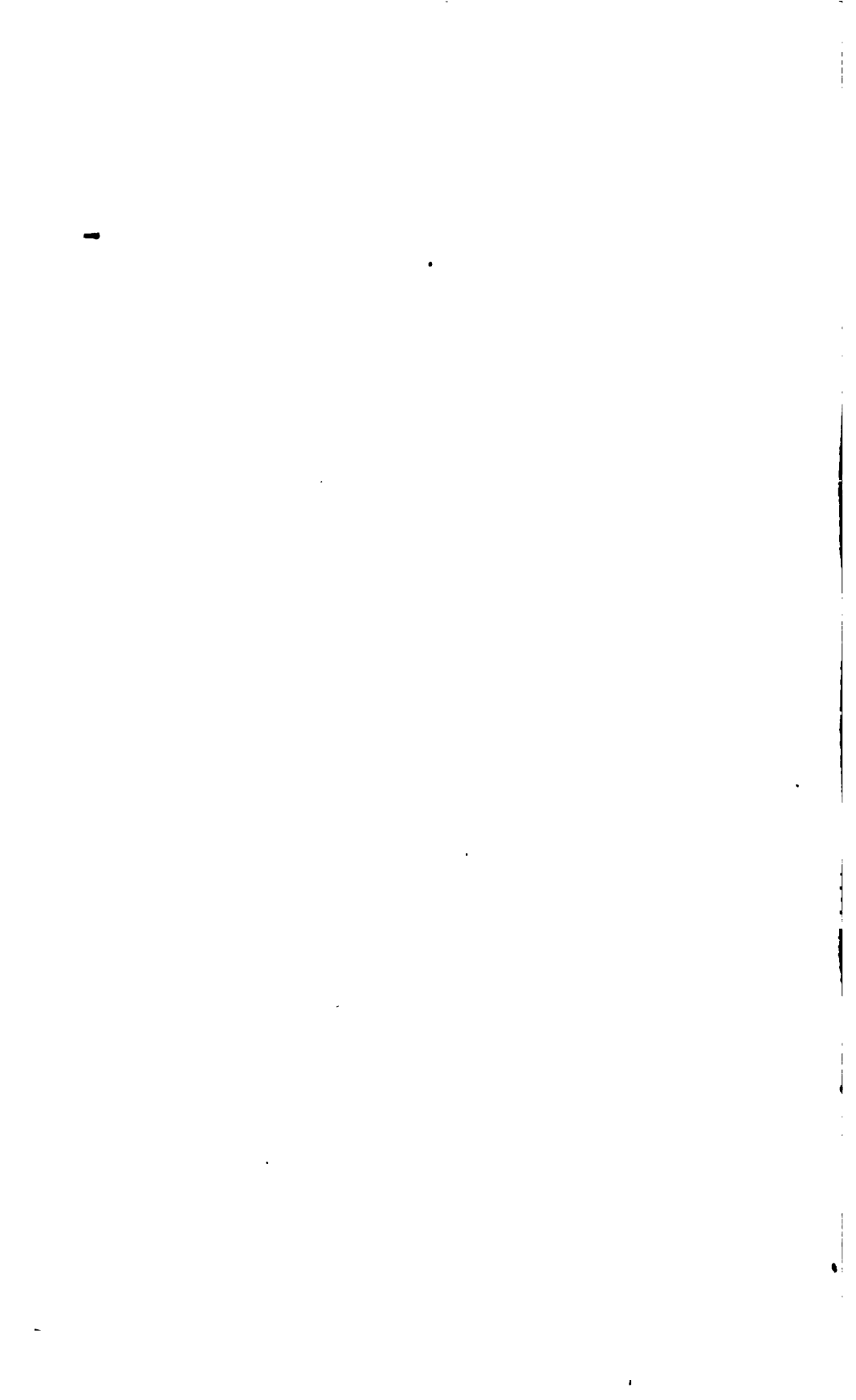
- Wright v. Douglass, vol. 10—97. *Reversed*, 7 N. Y. 564.
Wright v. Garlinghouse, vol. 27—474. *Reversed*, 26 N. Y. 539.
Wright v. Miller, vol. 4—600. *Reversed*, 8 N. Y. 9.
Wright v. New York Cen. R. R. Co., vol. 28—80. *Reversed*, 25 N. Y. 562.
Wright v. Paige, vol. 36—438. *Affirmed*, 3 Keyes, 581.
Wynehamer v. People, vol. 20—567. *Reversed*, 13 N. Y. 378.

Y

- Yale v. Dederer, vol. 21—286. *Reversed*, 18 N. Y. 265.
Yale v. Dederer, vol. 31—525. *Reversed*, 22 N. Y. 450.
Yates v. Lyon, vol. 61—205. *Reversed*, 61 N. Y. 334.
Yates v. Olmsted, vol. 65—43, 462. *Modified and affirmed*, 56 N. Y. 633.
Young v. Brush, vol. 38—294. *Reversed*, 28 N. Y. 667; 18 Abb. 171.
Youngs v. Lee, vol. 18—187. *Affirmed*, 12 N. Y. 551.

Z

- Zogbaum v. Parker, vol. 66—341. *Affirmed*, 55 N. Y. 120.



INDEX.

A

ACCOMPLICE.

See CRIMINAL LAW, 3, 4, 5, 6, 9, 10, 11.

ACCORD AND SATISFACTION.

1. An answer alleged that the plaintiff, for a good and valuable consideration, and upon a full settlement concluded between it and S., relinquished and discharged any and all claims in regard to certain property, either against the defendant or any other person. *Held*, that the defence thus set up was by way of accord and satisfaction; and if the agreement was made as stated, it would be binding upon the plaintiff as a contract; whether in writing or otherwise. *Pacific Mail Steamship Co. v. Irwin*, 277
2. A written release is not necessary to create an accord and satisfaction, or a full settlement and discharge. *ib*
3. An agreement to receive a sum less than an admitted debt, and the receiving of such sum, is not a good accord and satisfaction. *Brooks v. Moore*, 398
4. But if there is a *bona fide* dispute as to the sum actually due, or a *bona fide* doubt or controversy as to whether anything is due, then an accord and satisfaction, or, more properly speaking, a compromise, may be established and held binding, although there is a payment of a sum less than was claimed by the creditor, or even a sum less than, by

an actual computation, might be found due to the creditor. *ib*

See BOND, 1.

PROMISSORY NOTES, 8.

ACKNOWLEDGMENT.

Of a debt.—See LIMITATIONS, STATUTE OF,

ACQUIRING LAND OR WATER.

Proceedings for, by Corporations.

1. The defendant was, by its charter, authorized and empowered, "for the purpose of supplying the city of Utica with pure and wholesome water," to purchase, take and hold any real estate, and to enter upon any lands necessary for that purpose, and to take the water from any springs, ponds, streams, &c., and divert and convey the same to that city; and to lay and construct any pipes, conduits, reservoirs, &c., proper for said purpose, upon any of such lands, after having caused a survey and map of the lands to be made and filed. And in case of failure to agree with the owners of lands or water, for the purchase thereof, provision was made for the appointment of commissioners to ascertain and determine the compensation. The company made and filed a map, and, in 1849, took proceedings for the acquisition of so much water as would flow through an aperture twelve inches in diameter, stating that so much water was necessary; and acquired it, having paid the damages assessed therefor. Subsequently it became necessary for the company to obtain an increased

- quantity of water to supply the city, and that it should have the right to take additional water for that purpose. *Held*, 1. That in the absence of any words in the defendant's charter limiting its right to purchase or acquire lands or water, to one instance, or to one set of proceedings, or limiting the extent of its acquisition, other than to the purposes contemplated in the charter, the power to acquire lands and water for those purposes was not spent, nor the statute exhausted, by one exercise thereof. 2. That the charter did not provide for one, only, but for successive, *purchases*, and successive *acquisitions*. 3. That the object or purpose to be attained by means of the incorporation was continuous; and the right to acquire lands by the right of eminent domain was designed to be compulsory, to enable the company to accomplish the full purpose of its incorporation. 4. That there was no limit as to the time, or number of times, when the power could be exercised, if exercised for the purpose of effectuating the object of the defendant's incorporation. 5. That the company did not, by its proceedings, in 1849, to acquire so much water as would flow through an orifice twelve inches in diameter, exhaust the right to acquire additional water; provided it had need thereof "for the purpose of supplying the city of Utica with pure and wholesome water." *Johnson v. Utica Water Works Company*, 415
2. Where it satisfactorily appears, upon an application by a railroad company for leave to acquire additional lands, 1. That the parties have not been able to agree upon the price of the land sought; and 2. That the lands are required by the company for the purposes of its incorporation, and to enable it to suitably build embankments, and provide suitable drainage, and to keep its road in proper condition to accomplish the purposes of its incorporation, effect should be given to the general railroad act of 1850, and the amendment of 1869, relative to the acquisition of additional lands by railroad companies, when necessary; and the petitioner be allowed to take an order appointing commissioners of appraisal. *Matter*
- of the application of the New York Cen. &c. R. R. Company to acquire land*, 426
3. Section 28 of the general railroad act of 1850, authorizing companies formed under that act to lay out their roads "not exceeding six rods in width," relates to the first laying out, and the first construction, of a railroad; and must be read in connection with § 21 of the same act, with the amendment of 1869 (chap. 237) added thereto; which amendment permits lands to be subsequently taken by a company, in addition to what it was originally entitled to acquire, when laying out its road, if such additional lands shall be required for the purposes of the incorporation. *ib*
4. It cannot be said that the "purposes of its incorporation" are accomplished when a road is constructed, and in operation, with two tracks. The company is bound, by express enactment, to furnish to passengers and freighters the means of transferring passengers and freight in accordance with the statutory requirement. *ib*
5. This duty has been cast upon the company, and to accomplish it, the road must keep up with the growing demands for further facilities. *ib*
6. The statute authorizes a road, coming within its terms, to acquire such lands as are necessary to its operation, though when acquired and added to those already owned, the road would be more than six rods in width. *ib*
7. The act must be so construed as to give effect to its provisions, and so as not to defeat the object of the legislature. *ib*
8. Where, upon an application by a corporation, under the general railroad act, to acquire land for its purposes, a petition, full and complete in its statements, and containing all the requisite averments, is presented by the applicants, the fact that owners appear and show cause, denying some of the allegations in the petition, and objecting to the legality of the proceedings, does not create issues which render

it obligatory upon the petitioners to prove the facts alleged in the petition. *Matter of the petition of the New York Bridge Company, to acquire land, &c.,* 295

9. The fifteenth section of that act puts upon the owner of the land the burden of proving, and by legal evidence, that the facts alleged in the petition are not true. An affidavit or answer is not sufficient for that purpose. *ib*

10. If, on the day of showing cause, no testimony is given or offered, showing the facts set forth in the petition to be untrue, an order may properly be made, appointing commissioners of appraisal, without further proof of them than that presented by the petition. *ib*

11. Under the provisions of the act incorporating the New York Bridge Company (*Laws of 1867, chap. 390,*) it is not necessary for such company to serve notices upon the actual occupants of land over or upon which the bridge is to extend or rest, in accordance with the provisions of section twenty-two of the general railroad act; and the omission to give such notices is not a jurisdictional defect. *ib*

12. Section twenty-six of the general railroad act, which provides that if any title or interest in real estate required by any company shall be vested in any trustee not authorized to sell, release or convey, or in any infant, idiot or person of unsound mind, the Supreme Court shall have power to authorize such trustee, or the general guardian or committee, to sell and convey the same, was designed to enable the trustee, guardian or committee to move in order to acquire the power to contract or agree for the sale of the land; and is not compulsory upon the railroad company. *ib*

13. By statutes passed in 1867 and 1869 the bridge across the East river, between New York and Brooklyn, was required to be completed on or before the first day of June, 1874. On the fifth day of June, 1874, four days after the expiration of the limit, the legislature passed an act provid-

ing for the completion of the bridge, and authorizing the cities of New York and Brooklyn, by the issue of bonds, to pay moneys, during the years 1874 and 1875, towards that object. *Held*, that this was not only a legislative waiver of the limit previously declared, but an extension of the time during which the bridge should be finished. *ib*

14. The provisions of the first section of said act of June, 1874, declaring that when the cities above named should accept the provisions of the third section, and when the owners of two thirds of the private stock of the bridge company should accept the provisions of the second section, then and thenceforth the board of directors of the company should consist of twenty members, to be appointed, eight by the mayor and comptroller of each of said cities, &c., is not a condition precedent controlling the effect of the act as a legislative waiver of the limit, or extension of the time of performance. Such waiver was absolute and unconditional. *ib*

See *ESTOPPEL*, 1. 2.
 STREETS.

ACTION.

1. One letting a horse to another, to be used, for hire, is bound to inform the hirer of the vicious propensities of the animal, if any; otherwise he will be liable for any damages which may happen to the hirer in consequence of a vicious act of the horse. *Campbell v. Page*, 113

2. Where the agent of the owner testified that at the time of the hiring he gave the hirer express notice of the horse's propensity to kick, and duly cautioned him on the subject, which the hirer, in his testimony, absolutely denied; *held* that the giving of notice was a question of fact, to be disposed of by the jury. *ib*

3. Money borrowed upon the credit of county bonds which the county was authorized by statute to issue and is legally liable to pay, becomes the property of the county the moment it reaches the hands of the county

- treasurer, or is deposited and placed to his credit as such treasurer, in bank. *People v. Ingersoll*, 472
4. The chamberlain of the city of New York being, *ex officio*, treasurer of the county of New York, the receipt of money by him, as such treasurer, is a receipt of it by the county. *ib*
 5. And where moneys so placed in the county treasury are, in pursuance of a corrupt, fraudulent and unlawful combination and conspiracy to that end, by individuals, drawn out of the treasury, and fraudulently divided between such persons and others, an action will lie against such persons, to recover the moneys back, and damages for the fraud perpetrated upon the county. *ib*
 6. In such a case, the county, being the owner of the property fraudulently obtained, is the "real party in interest," and the proper party to bring the action. *ib*
 7. The people of the state, by their Attorney-General, cannot maintain an action against the confederates to recover back the moneys so fraudulently taken and converted, or to recover damages for the fraudulent conspiracy and conversion. *ib*
 8. No complete determination of the controversy in respect to such moneys, or damages, can be had, to which the county is not a party. *ib*
 9. An action cannot be maintained by a married woman against a defendant for having, by his wrongful acts, advice and persuasion, induced her husband to abandon and become separate from her, whereby she is deprived of his society, support, maintenance and help. *Van Arnam v. Ayers*, 544
 10. At common law, a wife could not maintain such an action. And where the facts set forth in the complaint do not bring the case within either of the classes enumerated in § 114 of the Code, and § 7 of the act of 1862, (chap. 172,) the provisions of those statutes cannot be held to give her any right to maintain an action for the matters alleged in such complaint. *ib*
 11. The common law rule still remains in force, except as it has been changed by § 114 of the Code and the act of 1862; and if the wife is interested in a cause of action not provided for by those acts, she must join her husband as a party. *ib*
- Cause of.*—See COMPLAINT.
- What actions are referable.*—See REFERENCE, 3, 4, 5.
- Motion to revive and continue.*—See REVIVOR AND CONTINUANCE, &c.
- By United States.*—See UNITED STATES.
- See* CERTIFICATE OF DEPOSIT.
MARRIED WOMEN.
NEW YORK (CITY OF,) 1.
PROMISSORY NOTES, 10, 11, 12.
- ### ADMISSIONS.
1. In an action of ejectment, admissions or statements made by parties in possession, were received, with a view to explain or characterize their possession. *Held*, no error. *Bertholomew v. Lyon*, 86
 2. Since the Code, parol promises and admissions are insufficient to arrest the statute of limitations. *Fletcher v. Updike*, 364
- See* EVIDENCE, 4, 5.
PRACTICE, 12.
- ### AFFIDAVIT.
- See* ATTACHMENT, 9, 10, 11, 12.
- ### AGREEMENT.
1. *Consideration.*
 1. To create a consideration sufficient to support an obligation for the security or payment of money, nothing further is required by either law or equity than benefit to the party obligated, or harm to the person designed to receive it. *Haden v. Budensick*, 188

2. S. having agreed to furnish B. with materials and labor for erecting buildings upon lots owned by B., the plaintiffs sold to S. sashes, doors and blinds for such buildings, of the value of \$8,000, for which sum he filed a lien upon the buildings and lots. For the purpose of removing such lien from his property, B. executed a bond and mortgage to S., to secure the payment of \$8,000 and interest; whereupon the plaintiffs discharged the lien, and the bond and mortgage were assigned to them. When the bond and mortgage were given, there was, by the terms of the contract, nothing due to S. from B. In an action to foreclose the mortgage; *held*, that want of consideration could not be set up as a defence. That it was beneficial to the mortgagor and owner of the property to have the lien upon it discharged; and that after receiving the stipulated benefit, and giving the bond and mortgage for it, he could not be exonerated from the obligation to pay what he expressly covenanted for as its price. *ib*

3. *Held*, also, that if S., the contractor, failed to perform his agreement, the remedy against him was confined to an equivalent by way of damages, not by resisting the enforcement of the security. *ib*

2. Construction and effect.

4. The plaintiff agreed to deliver to the defendant, at C., 200,000 hoops, at \$3.50 per M. The hoops were to be well rived ash hoops, and of specified dimensions. Payments were to be made from time to time, as a certain number should be delivered. The plaintiff delivered 203,100 hoops to the defendant, at C., in bundles claimed to contain 100 hoops, each. After some 30,000 of the hoops had been delivered, it was mutually agreed that the hoops should be inspected; but no time or place, or person, when, where and by whom such inspection should be made was agreed upon. The defendant sold the hoops so bought of the plaintiff to a salt company, and shipped those delivered, by canal, to S. At that place, an agent of the salt company inspected some fifty bundles and found them short in num-

ber, and defective in quality, so that there were but fifty-eight merchantable hoops in a bundle. The defendant then offered to return said hoops to the plaintiff, at S., provided he would pay \$162, the freight charges thereon, and the advances made to the plaintiff. This offer was refused, the plaintiff saying he could not take them back, and the defendant might do as he pleased with them. The defendant's agent examined some three hundred bundles of said hoops, at S., including those examined by the inspector, and found that they did not contain over fifty well rived ash hoops to the bundle, the residue being worthless. No inspection was made at C. In an action to recover the balance of the purchase price of the hoops, remaining unpaid: *Held*, 1. That the defendant was not entitled to damages for any deficiency in quantity, or defect in quality, of the hoops. 2. That the property was, by the terms of the contract, to be delivered at C., and when delivered there, it was the duty of the defendant to examine it, and promptly to accept or reject it. 3. That the subsequent agreement, that the hoops should be inspected, without designating any time when, place where, or person by whom, such inspection should be made, did not alter the original contract, except by relieving the defendant from inspecting at the very time of delivery. 4. That as the hoops were to be delivered at C., the inspection must be held to have been intended to be made at C. 5. That unless the plaintiff assented to an inspection at S., the acceptance at C., and shipment of the hoops to S. without the knowledge or assent of the plaintiff, was such a retention of the property as amounted to an admission that it was accepted in satisfaction of the contract. 6. That if there was not an acceptance of the hoops, so as to preclude the defendant from alleging and proving non-performance on the part of the plaintiff, there was no offer to return, within the principle of *Read v. Randall* (29 N. Y., 358.) 7. That the property being deliverable and to be accepted at C., the offer to return it at S., on payment of charges, was not such an offer as the plaintiff was

- bound to accept. And that the refusal to accept was not so broad and unequivocal as to cure any defect in the offer. 8. That the plaintiff was bound by a custom, existing at C., of inspecting a part of the whole quantity and to arrive at the quality and quantity of the whole by the average thus ascertained. But that the inspection of a part of the hoops, at S., was not conclusive evidence of the condition of the whole. And that the referee was right in finding that those only were to be taken to be defective that were actually examined. 9. That the inspection at S. did not bind the plaintiff; and besides, it came too late, the property then having passed from the plaintiff to the defendant. 10. That evidence of the making of a second agreement between the parties for the delivery by the plaintiff of more hoops, after the defendant knew of the defects in those previously purchased, was admissible to rebut the testimony of the witnesses, as to the bad quality of the former lot. *Staford v. Pooler*, 148
5. It was found, by the referee, that only three hundred bundles of the whole quantity of hoops were actually inspected; and these being found to be but one-half, or 15,000 of them conforming to the contract, the referee deducted, by way of damages to the defendant, \$52.50, being the value of 15,000 hoops at \$3.50 per thousand. *Held*, that the defendant was allowed, by the referee, for all the damages proved, on the facts found by him. *ib*
 6. When a contract is made for the purchase and sale of a given number of cords of wood, the vendor is bound to deliver, and the vendee is entitled to receive, 128 cubic feet for each cord of wood so contracted for. *Kennedy v. Oswego & Syracuse R. R. Co.*, 169
 7. Usage has prescribed the number of feet each cord shall contain; and in the absence of an agreement or of a custom that a less number of feet shall constitute a cord, the usage applies to, and controls, the agreement. *ib*
 8. Upon a contract for the purchase of a specified number of cords of wood which the purchaser is informed is but three feet long, he is not bound to accept of a pile of such wood eight feet long and four feet high, as a cord. *ib*
 9. When the known length of the wood is the only circumstance that can be relied upon in support of an implied agreement to take wood, less than four feet long, upon the contract, as if it were four feet, that fact alone is not sufficient to establish such an agreement. *ib*
 10. All the facts known to the parties at the making of the contract, or the delivery of the wood, are to be considered, in determining whether there was a contract to purchase wood, only three feet long, as if it were the proper length. They are competent to go to the jury, and from them it may infer such an agreement. *ib*
 11. When firewood or timber is purchased for some specific purpose, which requires it to be of a certain length, if wood of a length different from that contracted for is delivered and received, the contract is satisfied. But when the contract is for wood for being burned, and the contract does not define the length, it may be longer or shorter than four feet; but the vendor must deliver 128 cubic feet, for a cord. *ib*
 12. In the absence of any notice that an acceptance of wood, only three feet long, would be considered an acceptance of it as if it were four feet long, the acceptance and use of it by the vendee will not estop him from insisting upon a full cord. *ib*
 13. There was a conflict of evidence as to the making of an express agreement between the parties that, to avoid any trouble about measuring the wood, if the purchaser would take it at its length, the vendor would take four dollars per cord, for it. *Held*, that this was a question of fact for the jury and should have been submitted to them. *ib*
 14. Where, upon the evidence, the court had the right to find that the defendant, by its agent, agreed to take, upon a contract, wood only

three feet in length, as if it were four feet long, provided the plaintiff would take four dollars per cord, therefore; *Held* that, the court thus finding, the defendant was bound by the act of the agent; and that there was a sufficient consideration for the agreement. *ib*

15. E. M. agreed, on good consideration, to pay, take up and discharge, to the amount of \$20,000, the liabilities of S. W. as indorser or surety for A. W. and A. M. or the firm of which they were members. He took up some of those liabilities, to the amount of \$16,708.80, including three judgments against S. W., and those judgments were assigned to him (E. M.); but he failed to perform his agreement in full. *Held*, that E. M. having, in effect, assumed the payment of S. W.'s liabilities to the extent of \$20,000, and agreed to satisfy them, he thereby became the principal debtor, and could not take the judgments to himself by assignment, and enforce them against S. W., contrary to his promise. *Mores v. Brockett*, 264

16. The National Steam Navigation Company, preparatory to a dissolution of that corporation, transferred all its property to two liquidators, under the provisions of an English statute, and the said liquidators transferred all of said property to the defendant, on the 16th day of August, 1867; and on that day the Navigation Company ceased to do business, and commenced to wind up its affairs. Such transfer was made substantially upon the agreement and condition that the defendant should take and accept such property subject to the rights and equities therein subsisting, and particularly to the discharge of the several liabilities appearing on the books, papers and documents of the Navigation Company, and to all other liabilities of that company to which the said property was then subject; and would bear, pay and discharge, in due course, the several liabilities disclosed in said books, papers and documents, and all other debts, if any, of the said Navigation Company, and would devote and apply the property so to be made over to it for that purpose. On the 23d of

June, 1868, a judgment was recovered by the plaintiff's assignor, as administratrix, against the Navigation Company for an injury to her intestate, caused by the negligence of that company in navigating its vessel, on the 24th of October, 1867. In an action brought by the plaintiff to enforce that judgment against the defendant on the ground that it had assumed to pay the debts and liabilities of the Navigation Company: *Held*, 1. That the liability to the plaintiff's assignor for an injury which occurred to her intestate on the 24th of October, 1867, could not appear in the books, papers and documents of the Navigation Company on the 16th of August preceding, and was not then a debt or liability of that company which was or could be assumed by the defendant. 2. That the action of the plaintiff's assignor, in which the judgment was recovered, was brought against the wrong party. That the defendant being, at the time when the injury occurred, the owner of the vessel causing the injury, and engaged in its navigation, the alleged wrongful act and negligence were its own, and not those of the Navigation Company, the corporation which was sued. 3. That it could not be held that by the agreement made on the transfer of the property the defendant bound itself to pay its own liabilities that might thereafter spring out of the wrongful acts and negligence of its own servants; nor did the agreement contemplate or provide for liabilities of that kind which might be asserted by actions improperly brought against the Navigation Company, which had ceased to do business, and was existing only in the process of winding up its affairs. 4. That the agreement did not embrace the judgment in question, unless it appeared that the injury happened by the act of the Navigation Company, or of its liquidators, *in the course of the winding up of its affairs*, under the statute mentioned therein. 5. That it not being shown that the defendant was a privy to the suit against the Navigation Company, so that the judgment therein could be treated as a judgment against itself, the defendant was not bound, nor estopped by such judgment; and that

the complaint was properly dismissed. *Miller v. National Steamship Co.*, 285

17. M. and his wife, the plaintiff, who had separated and were living apart at the time, a suit brought by the wife for a limited divorce being then pending, settled such suit, in October, 1871; and on the 27th of that month, they executed an instrument by which it was agreed that the plaintiff should live apart from M., and the latter was to pay her \$5,000 yearly, and if she kept house, \$500 more. It was payable at a savings bank in S., in equal monthly payments, to the credit of the wife, so long as she should remain the wife of M. or continue his widow, &c. And for securing the prompt and regular payment of such annuity, M. covenanted and agreed that he would make and execute a valid will, and keep the same at all times in force, in and by which he should provide for the *fulfilment*, on his part, of said instrument, and make the payments, therein provided for, a lien and charge upon his estate. The wife covenanted and agreed that she would accept and receive the provision made for her support, in lieu of all claim, charge or incumbrance, in any way or manner, or *at any time thereafter*, upon M. or his representatives, or upon his estate. M. had, on the 9th of November, 1870, executed a will by which he directed his executors to pay \$2,500 to his wife, during her life, or until she should again marry. On the 30th of October, 1871, he added a codicil thereto, by which the said annuity to the plaintiff was revoked; and it was provided: "And I hereby give and bequeath to my said wife the sum of \$5,000 yearly, *to be paid* to her, each and every year, in monthly instalments, so long as she shall continue my widow." M. died in April, 1873. The principal question was, whether the plaintiff was entitled to receive, out of M.'s estate, \$5,000 a year during her life or widowhood, or \$10,000. *Held*, 1. That the agreement of separation was valid and binding, and such an one as the parties might lawfully enter into; they being actually separated, and living apart, at the time it was made. 2. That the covenant

of M. to pay \$500 a year if the plaintiff should keep a house on her own account, and occupy the same as her residence, was contingent; that she must rent and keep a house before the covenant would become operative, or the \$500 payable. 3. But that the covenant to pay an annuity of \$5,000 was not contingent; that it was absolute, and the liability to pay was fixed and settled, the moment the agreement was executed. That M. was under an operative covenant, and he and his estate were chargeable with the observance thereof; which was liable to be defeated only by her death, subsequent marriage, &c. 4. That beyond this covenant to pay the annuity of \$5,000, M. was bound to *secure* the payment thereof, by a testamentary provision for the "fulfilment" of such covenant by him. 5. That in the absence of any proof showing an intent on the part of the testator to be more liberal and generous with the wife, by donating an additional sum, than the terms of the agreement called for, the presumption was that the giving of the annuity of \$5,000 named in the codicil was intended as a compliance with the agreement of the testator to provide for that sum; that it was inserted in the will as an intended fulfilment of such agreement. And that it should be held a satisfaction of the agreement, *pro tanto*, if availed of by the wife. 6. That the plaintiff was entitled to receive only the annuity of \$5,000; and to enforce the \$500 rental covenant whenever she should bring herself within its terms. *Magee v. Magee*, 487

3. Performance; tender of.

18. Where a purchaser is bound, by the contract, to inspect and accept or reject the property, at the time and place of delivery, the offer to return, if the property does not conform to the contract, must be then and there made. *Stafford v. Pooler*, 143
19. Where an offer is made, to do an act at a place other than the one at which the law or the contract requires it to be done, and the refusal is in terms which show an intent not to accept performance anywhere, the offer will be held sufficient. But

- when the offer is such that the party to whom it is made is not bound to accept any part of it, a refusal which does not, in terms, preclude any further attempt at performance, does not dispense with a performance. *ib*
20. Where a party offers to perform some of a series of acts which the law requires to be done in order to discharge a duty or establish a right, and the offer is refused in such terms as to satisfy a court or jury that the party would not accept anything offered, a further offer is excused. *ib*
21. Where there is no stipulation for credit or delay, on either side, in contracts for the sale of property, a delivery of it, and the payment of the price, are each conditions of the other, and neither party can sue for a breach without having offered performance on his own part. A mere readiness to perform is not sufficient. *Speyer v. Colgate*, 192
22. The plaintiff being, in January, 1865, the owner of \$40,000 in gold, which had been purchased for him by the defendants, as his brokers, entered into two agreements with M. for the sale thereof to him; by one of which he agreed to deliver to M. \$20,000, at M.'s option, between the 1st and 20th of February, and by the other he agreed to deliver to him \$20,000, at any time when called for, between the 21st day of January and the 20th of February. The gold was to be delivered, and the price paid, in New York. These contracts, signed by M., were sent by the plaintiff to the defendants, with directions to deliver to M. the amounts of gold contracted for. On the 30th of January, an agent of M. demanded of the defendants, and received from them, the \$20,000 first deliverable. The \$20,000 sold under the other agreement was not tendered by the defendants during the time specified in that agreement. *Held*, that it was the duty of the defendants to make such tender; and that the plaintiff having, by their neglect to do so, lost the benefit and advantage of the sale, and the right to enforce the contract, he was entitled to recover of the defendants the damages he had sustained. *ib*
23. *Held*, also, that the plaintiff, on discovering that the defendants had failed to deliver or tender the gold, should have taken prompt measures to protect himself from further loss, by directing a sale of the gold on hand; and that he having omitted to do so, the defendants were not liable for any loss occasioned by a subsequent fall in the price of gold. *ib*
4. *Breach of; damages upon.*
24. In June, 1873, a contract was made between the parties by which the plaintiff agreed to carry coal for the defendant, from Watkins to some point east, that season, at regular prices, and the defendant agreed to load the plaintiff's boat in regular turn with its own. On the 14th of August, after carrying two loads of coal, the plaintiff came to W. with his boat, for another load, his turn coming on the 16th. He was obliged to wait for a load until September 3d. *Held*, that the defendant, in failing to load the plaintiff's boat in its turn, broke its contract; and the plaintiff was entitled to damages, for such breach. *Kelly v. Fall Brook Coal Co.*, 183
25. *Held*, also, that the plaintiff, being under a contract with the defendant for the season, was entitled to notice that the defendant would not perform the agreement, on its part; and that, in the absence of any such notice, the plaintiff was justified in waiting for a load, and should be allowed, as damages, the profits of one trip, which it was shown he could have made during the period of detention. That what he could have earned under the contract, during that time, was the proper measure of his damages. *ib*
26. *Held*, further, that the defendant had no right to claim that in measuring the damages, the referee should have considered, by way of reduction, the profits made by the plaintiff during the rest of the season, after the September trip. *ib*
27. Also *held*, that the plaintiff was entitled to interest upon the amount of damages recovered. *ib*
28. A party subjected to loss by the misconduct of another has no right

to unnecessarily enhance it for the purpose of aggravating the injury caused by the wrong. Good faith requires him to protect himself from needless loss, so far as that can be accomplished by reasonable efforts and attention. *Per DANIELS, J. Spreyer v. Colgate,* 192

5. Reforming.

29. To warrant the court in reforming a contract, by inserting provisions that were omitted, or in correcting the same in any matter in which an error occurred, it must appear that such mistake was made by both parties. If one party was mistaken, and the other was not, no such judgment can be rendered. *Van Tuyl v. Westchester Fire Ins. Co.,* 72

30. This, like any other question of fact, is to be settled by the jury, or by the court if the action is tried without a jury; and where the evidence is conflicting, and contradictory, the finding at the trial is conclusive upon the parties. *ib*

31. In an action brought to reform a policy of insurance upon a mill, by inserting therein a permission to run the mill over time, or at night, and to recover thereon for a loss, the judge before whom the action was tried found, upon conflicting evidence, that by the mutual mistake of both parties and their agents, such permission was not inserted in the policy, and that the mistake was not discovered until after the loss. *Held,* that this finding of the judge upon the question of fact being conclusive, a judgment directing the policy to be reformed, and that the plaintiffs recover the amount insured, was properly rendered. *ib*

32. A policy of insurance can be reformed after a loss has occurred. *ib*

6. For life insurance.

33. The defendant having bought out and taken the risks of the H. Life Insurance Company, by M., its authorized agent, urged S., who held a life policy for \$2,000, issued by the H. Co., that had lapsed by non-payment of premiums, to take a new

policy for the same amount in the defendant's company. The result was, the execution of an instrument by M., as such agent, dated Nov. 26, 1872, by which he acknowledged the receipt of the lapsed policy, "in exchange for which" the defendant agreed to "issue its policy of the same amount, and deliver the same within a reasonable time, and in the meantime keep the insurance good." At the same time S. executed his promissory note to the defendant, for \$54.76, being the amount of premium in its company for one year, payable in forty days. *Held,* 1. That the agreement and note were to be considered and construed as constituting and evidencing the transaction had, at their date, between the parties. 2. That the instrument signed by M. constituted an agreement binding upon the defendant to issue to S. a policy in the defendant's company, upon the life of S., for the same amount specified in his former policy. 3. That such agreement constituted, in itself, in legal effect, from its date, a policy of insurance, or imposed a legal duty and obligation to execute and deliver such policy in proper form, bearing the date of such agreement. 4. That the policy which the defendant was, by such contract, to execute, was a new and independent contract to be executed and delivered in consideration of the sum of \$54.76, and in payment of that sum the defendant took and received the said promissory note of S. 5. That such note of S. must be presumed to have been received in payment of the premium of the new policy. That it was an original undertaking, payable in a specified time, without reference to the time when the policy was to be delivered. 6. That the non-payment of such note at maturity did no affect the validity of the policy; the contracts being independent of each other, and there being no stipulation, in the agreement, that non-payment of the note should avoid the policy. *Shaw v. The Republic Life Ins. Co.,* 586

See JURISDICTION, 2, 3.
PAYMENT, 1.
PHYSICIAN, 2.
STOCK, 1.

ALLOWANCE.

1. The statute gives an allowance on the amount recovered or claimed, or the subject-matter involved. In the latter case such value is to be ascertained by the court. *Grisler v. Stuyvesant*, 81
2. The only relief sought in an action was an injunction to restrain summary proceedings for the dispossession of the plaintiffs from certain premises, and that only for a limited period. No money was sought to be recovered, and no property was the subject-matter of the action. *Held*, that there was nothing in the case on which an allowance could be estimated; the subject-matter involved being the right to prosecute the summary proceedings, the value of which right it was not practicable to estimate. *ib*
3. Under the Code of Remedial Justice an extra allowance may be made to the plaintiff, in a judgment of foreclosure. *Barker v. Burton*, 458

AMENDMENT.

1. *On the trial.*

1. Power or right of the court to order an amendment of a complaint, upon *the trial*. *People v. Ingersoll*, 472
2. *By referee.*
2. The power of a referee, to allow amendments, is not as great as the power of the court at Special Term. His power is restricted, like that of the court at circuit. *Chittenango Cotton Co. v. Stewart*, 423
3. An amendment of the summons and complaint which, in effect, strikes out the name of the plaintiff and substitutes another in his place should be applied for at Special Term. The power to grant it is not with the referee. *ib*
4. Whenever such an amendment becomes necessary, the referee may suspend the trial; or grant an adjournment, and allow the applica-

tion to be made at Special Term, for leave to amend. *ib*

3. *On appeal.*—See *INFANTS*, 3.

ANSWER.

1. Although an answer be defective in form, yet if the cause is tried, before a jury, without any objection to the pleading on the ground of insufficiency, the objection will be deemed to have been waived; and upon appeal, the case will be examined on the merits of the matters litigated before the jury. *Chaffee v. Morris*, 252
2. An answer alleged that very large discretionary powers in regard to the control and management of the affairs and property of the plaintiff and in regard to the expenditure and disbursement of its funds, were conferred upon S., its president. In a succeeding paragraph it was alleged that S. had abused such discretion and misapplied, squandered and wasted the funds, including the sums mentioned in the complaint for which the defendant was prosecuted. *Held*, that the allegation in the first paragraph was necessary for the intelligent statement of the defence set up in the second paragraph; and that, being in the nature of a preamble or introduction, it was not open to the charge of irrelevancy. *Pacific Mail Steamship Co. v. Irvin*, 277
3. A defendant, having stated a defence, in his answer, is not bound so to define it, or rather enlarge it, as to set out the proofs by which it is to be established. *ib*
4. On application to strike out an answer as irrelevant, it must appear that the matter objected to is indeed irrelevant, and that the party is aggrieved thereby. It was not designed that such an application should be granted for every redundant averment or statement in a pleading. *Per BRADY, J.* *ib*
5. An answer is indefinite when the precise nature of the defence is not apparent. *ib*

6. A complaint alleged that the plaintiffs performed work, labor and services for and at the request of the defendants, their agents and servants, in printing and advertising for them in a newspaper named. The defendants, by their answer, denied that they requested or employed the plaintiffs to print or publish the notices, &c., and set up other matters as an answer and as a further and separate defence. *Held*, that the denial struck at the very foundation of the plaintiffs' case, and could not be stricken out as frivolous; as it created an issue which called for investigation, and the affirmative of which it was incumbent on the plaintiffs to establish. *Dinmore v. Mayor &c. of New York*, 341

APPEAL.

1. When, upon appeal to the General Term, a judgment of a county court is reversed, and a new trial ordered, "without costs on the appeal to either party," the clerk has no power or authority to tax the costs of appeal and enter the same in the judgment of reversal. *Chase v. Miser*, 441
2. If it appears, in such a case, that in the county court affidavits tending to show that injustice was done to the defendant, by the judgment of the justice, were read and passed upon; and that the court refused a new trial in the exercise of its discretion, the General Term, on appeal from the county court, has no power to award a new trial. *ib*
3. But if the county court omitted to pass upon the affidavits, on the ground that it had no power, then the General Term may, on appeal, reverse such holding. *ib*
4. Where it does not appear that the county court did act, one way or the other, upon the affidavits, the question as to the power of the General Term to make an order granting a new trial "without costs of the appeal to either party" cannot properly be passed upon on a motion to compel the clerk to tax the defendant's costs of appeal, and enter the same in the judgment. *ib*

5. Service of a notice of judgment, to limit the time for appealing, is complete when it is mailed to the attorneys of the other party, properly addressed &c.; whether it is received by such attorneys or not. *Miller v. Shall*, 446

See JUDGMENT, 6.

APPEARANCE.

Upon an appearance by an attorney in behalf of a defendant, jurisdiction can be predicated; and a judgment based thereon cannot be said to be void. *Bissell v. New York Cen. &c. R. R. Co.*, 385

See STATUTORY PENALTIES, 2.

ARREST.

See WARRANT.

ASSIGNMENT.

See LIEN, 3, 4.
MORTGAGE, 6, 7.

ATTACHMENT.

1. *Under § 236 Code of Procedure.*
1. Upon an order requiring a debtor of the defendant to appear and be examined because of his refusal to give the certificate specified in section 236 of the Code for the benefit of an attaching creditor, the debtor can state the character in which he holds the moneys, and the manner in which they were obtained, and the object of gathering them together. But this should be the limit of the examination. *Baxter v. Missouri &c. Railway Co.*, 283
2. Whether the funds are held under a trust, and whether the trust is valid or not, may be the subject of investigation in another mode. *ib*
3. When the certificate is given, unless it be false, the proceeding is at an end; but a refusal to give it, even when the party says he has no property of the debtor, warrants the order for examination. *ib*

4. The creditor is not bound to accept the statement, and may pursue the remedy, subject to its burdens, if any. *ib*

2. *Against property; duty of sheriff.*

5. It is the duty of a sheriff, acting under an attachment, to attach the real and personal estate of the debtor. And that can only be done by taking it into his custody, where the property is tangible in its character. *United States v. Graff*, 304

6. Hence, an order directing a sheriff, under an attachment, to open a safe and tin box containing the property and securities of the defendant, on deposit in a trust company, and to take therefrom and safely keep the property and evidences of debt, liable to attachment, found therein, is not improper. *ib*

7. Such safe and box are not within the protection which the law affords to a debtor's dwelling house, against an officer acting under civil process. They are simply places of deposit and safe keeping, which the sheriff may enter to make the seizure required by law, in the execution of the process. *ib*

8. An order directing the exclusion of the counsel and agents of each party, at the time of the opening of a safe containing the property and securities of the defendant, by the sheriff, is a proper exercise of the discretion of the court. *ib*

3. *Affidavit for.*

9. To entitle a party to an attachment, a reasonably plain case must be made out. The existence of a cause of action must be shown. *Manton v. Poole*, 380

10. The affidavit should contain a statement of the facts out of which the claim arose; and they should appear to warrant the conclusion or claim deduced from them. A statement of its amount, without facts justifying the conclusion, does not comply with the requirements of the Code. *ib*

11. A mere recital of facts, without a direct statement of the existence of any of them, is insufficient. *ib*

12. Where the action is to recover damages for the breach of an agreement, so much of the agreement as contains the obligation relied upon as the foundation of the action should be plainly and positively disclosed in the affidavit for an attachment; and it should then be shown, with equal directness, in what respect there has been a failure of performance, and how, and to what extent, the plaintiff has been injured, by means of it. *ib*

4. *Undertaking upon.*—See UNDERTAKING.

See UNITED STATES, 6.

ATTORNEY.

1. An order and notice of substitution are both essential, to render a change of attorneys regular. Notice alone, without an order actually obtained, is insufficient. *Miller v. Shall*, 446

2. And unless an order for substitution is obtained, and notice thereof served upon the opposite attorney, he is not bound to recognize the person claiming to be substituted, and may disregard and return notices received from him. *ib*

See JUDGMENT, 6.

AWARD.

See NEW YORK (CITY OF), 1, 2.

B

BANKRUPTCY.

See PROMISE.

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 4.

BILL OF LADING.

See INSURANCE (MARINE), 9, 10.

BONA FIDE HOLDER.

See CHECKS, 1, 2.
COMPLAINT, 5.

BOND.

1. A bond was given to the bank comptroller of the state of Wisconsin, by M. and the defendant's testator, for the security of the circulating notes of a bank. M., the owner of the bank, sold and transferred its entire stock to D., who, with a surety, executed and delivered to the same officer a new bond, for the same purpose. The old bond was given up, and the new one accepted in its place. At that time, an act of the legislature was in existence, authorizing this to be done; and the parties acted in good faith, and intended to comply with its provisions. *Held*, that the old bond was extinguished by what the law denominates an accord and satisfaction made by a third party; and that an action would not lie to enforce it. *Rusk v. Soutter*, 371
2. The obligors in the substituted bond, being sued upon it, failed to resist a recovery on the ground that they had executed it without authority of law; and judgment by confession was entered against them. *Held*, that by such omission they had waived their right of objecting that the law under which such bond was executed was unauthorized by the constitution of the state. And that the obligation mentioned in it became as effectual, against the obligors, as though the bond had been given under a valid law. *ib*
3. That a complete legal liability was created, and that was sufficient to render the new bond a good accord and satisfaction. *ib*
4. *Held*, also, that the bond which it was designed the comptroller should have, as the consideration of the exchange, having been sustained by a judgment of a court in Wisconsin, the plaintiff could not now stand upon the averment that such bond was unauthorized because the law under which it was made was not warranted by the constitution, with-

out its ratification by a vote of the people. *ib*

See COMPLAINT, 4.
JURISDICTION, 1, 2, 3, 4.
MORTGAGE, 6, 7, 8.

BROKERAGE.

See REAL ESTATE BROKERS.

BURDEN OF PROOF.

See NEGLIGENCE, 1.

C

CARE, SKILL AND DILIGENCE.

See COMMON CARRIERS.
NEGLECT.

CASES COMMENTED ON, AND DISTINGUISHED OR APPROVED.

1. The case of *Guy v. Mead* (22 N. Y. 468,) distinguished. *Kennedy v. Oswego & Syracuse R. R. Co.*, 171
2. The case of *Collins v. Mayor &c. of New York* (3 Hun, 680,) distinguished. *Smith v. Mayor &c. of New York*, 223
3. The cases of *Bowen v. Lease*, (5 Hill, 221;) *Robinson v. Bank of Utica*, (21 N. Y., 406;) *Sibell v. Remsen*, (83 N. Y., 95;) and *Harris v. Thompson*, (15 Barb., 62,) commented on and distinguished. *Excelsior Petroleum Co. v. Embury*, 321
4. The case of *Morgan v. Morgan* (1 Abb., N.S., 40,) approved. *Gilman v. Redington*, 321

CERTIFICATE OF DEPOSIT.

Upon a certificate of deposit, payable to the order of the depositor, in current funds, on the return of such certificate, with interest, which is indorsed and transferred by the depositor, an action can be maintained by the indorsee, against the indorser, after demand of payment at the bank

and notice of dishonor. *Pardee v. Fish*, 407

CERTIORARI.

See INSOLVENT DEBTORS, 8.

CHATTEL MORTGAGE.

See INSURANCE (MARINE,) 1.

CHECKS.

1. A check, dated Jan. 21, 1865, was drawn by M. & Sons, payable to their own order, upon the defendant, and indorsed by the drawers. It was, on or about that date, accepted by the drawee, certified to be "good," and registered. On the 4th of February, 1865, the check while in the hands of M. & G., was stolen from their book-keeper. Notice of the theft was given to the bank, or payment of it stopped, on the same day. In May or June, 1865, the plaintiff became the owner and holder of the check, paying value for it, and taking it in a legitimate manner, as an investment, after making all the inquiries which it was incumbent upon her to make. *Held*, 1. That if the signatures to the check and certificate were genuine, the plaintiff was not bound, by anything appearing upon the face of it, to exercise any other caution, vigilance or diligence, so far as the bank was concerned. 2. That the check was not to be deemed dishonored, like a promissory note payable on demand, from the delay in presenting it for payment, but on the contrary, was paid by the drawers, by an absolute appropriation of their funds to meet it, which the bank held for the transferee, whoever he might be. 3. That the certificate was to be regarded as an acceptance, payable on demand, and was obligatory until paid, or the statute of limitations should attach as a bar. 4. That the court below erred in deciding that the plaintiff was not entitled to recover upon the check, against the bank because the same was, in judgment of law, dishonored. 5. That the check having been stolen, it became the duty of the plaintiff to establish that she was a *bona fide* holder for value; and that

the refusal of the judge to submit that question to the jury, on the ground that the check was overdue and taken subject to existing equities, was error. *Nolan v. Bank of New York Nat. Banking Ass'n*, 24

2. The question of equities between any of the prior parties to a certified check cannot intervene against a *bona fide* holder for value. He deals upon the paper alone, looking to the bank as the primary debtor. *ib*
3. The plaintiff, having in his possession certain papers upon which he claimed a lien for money loaned to P. & S. for the defendant, P. & S. borrowed of the defendant his check, and passed the same to the plaintiff to discharge the debt and obtain possession of the papers, the defendant knowing, at the time of delivering the check, that it was to be used by P. & S. *Held*, that these facts constituted the plaintiff a *bona fide* holder of the check. *Ailken v. Meyer*, 181
4. *Held*, also, that it was entirely immaterial that the check was made payable to P. & S. That it was sufficient that the plaintiff had possession of papers upon which he claimed a lien, and that he took the check, and in consideration thereof delivered up the papers. *ib*

See PAYMENT, 1, 2, 5.
PROMISSORY NOTES, 4, 7.

CLERK.

See APPEAL, 3.

CODE OF REMEDIAL JUSTICE.

See ALLOWANCE.

COLLISION

1. In an action for damages caused by a collision between vessels, a witness being examined as to the location and position of the vessels at the time, and as to the extent of navigable water on each side of them, and having given the distances; *held*, that it was proper for him to state the fact whether or not there

was deep water on each side for the vessels to pass safely without grounding. *Blanchard v. New Jersey Steamboat Co.* 101

2. A witness, having testified that vessels did not all carry the same signal lights, was asked, "What differences are there?" *Held*, that the question was immaterial, the point being what signal lights the plaintiffs' boat carried, and whether they were sufficient, as an admonition to other vessels. *ib*
3. A witness was asked: "Was there a custom, among pilots, at flood-tide, as to which side of the channel vessels were to go down in that neighborhood?" He answered: "They went down further to the east than I was." *Held*, that the evidence was not objectionable; as it tended to show the true position of the vessel, as to navigable water. That even if the answer tended to show a custom, it was competent; notwithstanding the mode of navigation is regulated by law. *ib*
4. A witness, on his cross-examination by the defendant's counsel, having spoken as to the value of the vessel sunk, and being questioned as to his competency to testify on that subject, stated that he had known of the sale of various steamboats, naming one — the *M.* — whose price was \$3,500. On his re-examination he was asked the value of the *M.*, and answered "\$16,000." *Held*, that the defendant's counsel having opened the subject of the value of the *M.*, and drawn out the fact, from the witness, that the price of that vessel, on the sale, was \$3,500, the subject was opened to the plaintiffs to ask of the witness her real value. *ib*

See NEGLIGENCE, 1, 5, 6, 7.
RAILROAD COMPANIES, 1 to 6.

COMMISSIONS.

Of broker.—See REAL ESTATE BROKERS.

COMMON CARRIERS.

1. The defendant was one of the companies furnishing a continuous and

connecting line of railroads from Titusville to Boston, engaged in the business of transporting oil and other freight from the former to the latter place. By an arrangement between such companies, cars loaded with freight were run from each terminus over the whole length of said line. The plaintiffs, being shippers of oil, at Titusville, provided and furnished wooden tanks of their own, suitable for holding oil to be transported over the said continuous line, from T. to B.; and, by an arrangement between them and one of the companies, such tanks were placed on platform cars belonging to that company, and fastened thereto, for safety, but they were to remain the property of the plaintiffs. Cars, with tanks thereon, filled with oil belonging to the plaintiffs, were run between T. and B. After the tanks were emptied of their contents, at B., the cars, with the empty tanks thereon, were, by the same line, returned to T. The carriers furnished the plaintiffs with a bill of lading, for each shipment of oil, specifying the quantity of oil, but no mention was made of the tanks themselves. No bill of lading was furnished on the return of the empty tanks; nor was any consideration paid for the transportation of such empty tanks, independent of that paid for the transportation of the oil from T. to B.; nor was any special arrangement made as to the return transportation. Two of said tanks, filled with oil, owned and shipped by the plaintiffs, to B., while being carried on said cars, and while on that part of the line owned and operated by the defendant, were, with their contents, burned up and destroyed. *Held*, 1. That the general business of the defendant was that of a common carrier; and if it was, in fact, or in a legal sense, transporting, for hire, the tanks destroyed, then the plaintiffs' claim against it, for the value of the tanks, was established. 2. That under the arrangement made by the plaintiffs with the railroad companies, the latter assumed, as to the tanks, the unrestricted liabilities of common carriers. 3. That although no compensation was paid to the companies, directly, for the transportation of the empty tanks, yet that they received a compensation in a

legal sense, in the payment of freight on the oil; and that the plaintiffs were entitled to recover the value of the tanks destroyed. *Spears v. Lake Shore &c. R. R. Co.*, 513

2. Where a contract is made, by a shipper of goods, with one of several connecting railroad companies forming a continuous line of carriers between the place of shipment and the place of delivery, for the transportation of goods and delivery thereof at the place of destination, the service performed by the other companies in the line is deemed to be done by, and at the request of the contracting company, and as its agents. *Monell v. Northern Cen. R. R. Co.*, 531

3. The acts and management of such connecting roads are, in law, the doings of the contracting company; and if they are such as to work a breach of the contract for transportation, the shipper has a right of action therefor, against the contracting company. *ib*

4. When the contract of a carrier is silent in respect to the time of delivery, the law requires him to use due diligence. The want of due diligence is the ground of the carrier's liability. *ib*

5. What is sufficient evidence to be submitted to the jury, upon the question of due diligence in delivering perishable property. *ib*

6. The defendant, a common carrier of goods for hire, contracted to transport a quantity of potatoes from Batavia, N. Y., to the city of Philadelphia. The potatoes were in good order, when shipped. The cars containing them arrived at G., a place within three miles of the place of delivery, within the usual time, but were left on the tracks at G. for at least fourteen days, before being taken to the city; and during that period the potatoes were frozen. It appeared that the company employed by the defendant to aid in the transportation and delivery of this freight had no warehouses in Philadelphia for storing freight temporarily, with a view to hasten and facilitate delivery; and that there was, at the time, a great accumulation of freight, both at that place

and at G. *Held*, that upon the evidence, it was a fair question for the jury to say whether or not due diligence was used by the defendant, in delivering the freight; and that the judge properly refused to take the case from the jury by granting a nonsuit, or ordering a verdict for the defendant. *ib*

7. *Held*, also, that if the potatoes were frozen at G., after a reasonable time for delivery had elapsed, the defendant was chargeable with the loss. That nothing short of a calamity would justify the holding of the cars at G. for so long a time. *ib*

8. Receipts for freight, given by a consignee to the carrier, stating the goods to be in good order, are evidence in favor of the latter that the freight was delivered in good order. But, as between the parties, they are not conclusive on the question. *ib*

9. When it appears that the carrier demanded that the receipts should be put in that form, as a condition to the delivery of the goods; and that the receipts were signed under a protest that the goods were not in good order; it is a fair question of fact for the jury, on the evidence, and cannot be disposed of in favor of the carrier, as a question of law. *ib*

10. Where the property delivered to a carrier for transportation is of a character recognized among carriers and forwarders as *perishable*, it requires particular attention, and a greater degree of care than attaches to such as is deemed non-perishable. *Tierney v. New York Cen. &c. R. R. Co.*, 538

11. A quantity of cabbages were received from the plaintiff, by the defendant, at East Albany, for transportation to New York, on the 6th and 7th of January. They were in the car, ready for the freight train, at 10.40 p.m.; from which place freight trains were accustomed to leave for New York every few hours, the running time being, ordinarily, about eleven hours. The car was left at East Albany a considerable time, although several other trains were sent over the road in the meantime; and it did not reach New

York until the 10th or 13th of January; when the cabbages were frozen, and nearly destroyed. *Held*, that the judge properly instructed the jury that the property having been delivered to, and accepted by, the defendant as perishable, it became its duty to forward it by the first train; unless there was such a pressure and accumulation of freight of a similar kind, which had previously arrived, as to prevent such immediate action. *ib*

12. *Held*, also, that if there had been no accumulation of freight for transportation, beyond the ordinary capacity of the road, all of it should have been forwarded in the order of its arrival; but if any delays were necessary, by reason of unusual accumulation, the perishable property should be forwarded, in preference to that which was non-perishable. *ib*

13. *Held*, further, that whether the plaintiff should have guarded the property by other means than those employed, was a subject for the consideration of the jury, holding in mind the character of the property; the state of the weather; the condition of the car in which the property was to be forwarded; the distance from its destination; and the usages of prudent men under like circumstances. *ib*

14. Also *held*, that the plaintiff took all risks of injury to the property from frost, which would have happened had it been forwarded immediately; and the defendant was to be held liable only for such damage as was occasioned by frost, as the result of inexcusable delay. *ib*

15. The plaintiff signed a receipt for the property, in New York, as "in good order." *Held*, that it was competent for him to show the circumstances under which this receipt was given; and that he might prove that he wanted to sign a receipt for the load as "in poor condition," but was not allowed to do so. *ib*

16. That he was not concluded by the terms of the receipt. That it was not of binding force as a contract; that, at most, it was but an admission, and therefore susceptible of

explanation and correction by parol evidence. *ib*

17. *Held*, also, that evidence of what the plaintiff could have obtained in the public market, for the cabbages, on the morning of their arrival in New York, was evidence bearing on the question of value, and therefore admissible on that question. *ib*

See INSURANCE (MARINE), 7, 8, 10.

COMPLAINT.

1. The only ground of action stated in a complaint was that the defendant had brought actions of ejectment against the plaintiffs for the recovery of certain real estate, and had afterwards, by summons, commenced summary proceedings to recover possession of the same premises, for non-payment of rent; and that the act of the defendant in procuring such summons to be issued, and all the proceedings thereon, were injurious to the plaintiffs, and, during the pendency of the ejectment suits, were an abuse of the proceedings prescribed by the statute under which the said summons was issued. The prayer was that the proceedings under the summons might be abated, and for an injunction. *Held*, on demurrer, that the complaint did not state a good cause of action. *Grissler v. Stuyvesant*, 77

2. Though immaterial allegations be inserted in a complaint, that is not a cause of demurrer; and they cannot be stricken out on a motion for judgment for frivolousness of demurrer. *Bostwick v. Dry Goods Bank*, 449

3. Redundant or impertinent matter, inserted in a complaint, do not furnish sufficient ground for a demurrer. *ib*

4. A complaint stated, in effect, that the plaintiff, being the owner of a certain United States bond, left it with B. & H., as her agents, to convert the same into cash for her; that B. & H. employed the defendant to accomplish that object; that the defendant sold such bond, or converted it into money, and instead of remitting the proceeds to the plain-

tiff, or her agents, B. & H., converted the same to its own use, by placing the same to the credit of B. & H. on their account: *Held*, on demurrer, that the complaint contained a good cause of action. *ib*

5. *Held*, also, that such diversion of the bond, or its proceeds, to the purpose of a security, or application upon B. & H.'s antecedent debt to the defendant, without the consent or authority of the plaintiff, or any fresh advances made thereon, did not constitute the defendant a holder in good faith and for value, as against the plaintiff. *ib*

6. *Held*, further, that even a person to whom B. & H. had, under such circumstances, voluntarily delivered the bond, upon an antecedent debt of theirs, could not hold it, as against the true owner. *ib*

See AMENDMENT, 1, 3.
PROMISSORY NOTES, 1.

COMPROMISE.

See ACCORD AND SATISFACTION, 4.

CONSIDERATION.

See AGREEMENT, 1, 2, 3.
VENDOR AND PURCHASER, 1, 2, 4.

CONSPIRACY.

See ACTION, 5.

CONSTITUTIONAL LAW.

1. The act of 1873, (chapter 335,) abolishing the board of assistant aldermen of the city of New York from and after the 1st day of January, 1875, and transferring its powers and duties to the board of aldermen, was valid and constitutional. *Demarest v. Wickham*, 312
2. The office being one whose duration was not provided for by the constitution, it was subject to the authority vested in the legislature, over all municipal corporations; and its duration could be declared

by law, within the plain import of section 3, article 10 of the constitution. *ib*

3. Accordingly *held*, that votes cast for the plaintiffs, for the office of assistant aldermen, at the general election held in November, 1874, were mere nullities, the office having been abolished; and that it was the duty of the mayor to recognize the board of aldermen, solely, as the common council of the city, and to regard and consider all its official acts, within the limits of its prescribed authority, as valid and effectual. *ib*

CORPORATION.

See ACQUIRING LAND, &c.
AGREEMENT.
MANUFACTURING CORPORATIONS.
NEW YORK BRIDGE COMPANY.
PARTNERSHIP, 2.

COSTS.

1. On the taxation of costs, upon a judgment on the report of a referee, the referee's decision awarding judgment, stands before the clerk as the mandate of the court, and until vacated and set aside, such direction should be obeyed. The clerk has nothing to do with the question whether it has been regularly obtained. *Ballou v. Parsons*, 19
2. On appeal from an order of a surrogate, the costs which may be awarded under section 318 of the Code, are only those which may be recovered in an action at issue on a question of law, from the time the proceeding is brought into this court, namely, \$20 for the argument, and \$10 for each term the appeal is necessarily on the calendar, exclusive of the term at which it is argued. *Gilman v. Redington*, 321
3. Where, in an action against an executor, there has been a reference, and a report in favor of the plaintiff, and a certificate by the referee, showing the presentment of the demand to the executor, an offer to refer, refusal by executor to refer, and a rejection of the claim, before suit brought, the proper practice is for the plaintiff to apply to the court

for an order allowing costs. The referee has no power to pass upon that question. *Smith v. Randall*, 377

4. In an action to foreclose a mortgage executed after the marriage of the mortgagor, but not given for the purchase-money nor executed by the wife, the latter is not a necessary party; and if she does not appear, the judgment properly allowable will not affect her prior and superior interest in the premises. *Bar-ker v. Burton*, 458

5. And if, after being served with the notice specified in § 131 of the Code, and subsequently with a stipulation that nothing in the judgment shall affect her claim to dower, the wife appears, and sets up the defence that she is not a necessary party, neither party will be entitled to costs, as against the other; the plaintiff having unnecessarily made her a party, and she having unnecessarily defended. *ib*

6. Where a plaintiff brings an action, in this court, claiming damages in the sum of \$150, and recovers less than \$50, the action being one of which a justice's court would have jurisdiction, but for the excessive claim of damages, he is bound to pay costs to the defendant. *Mechl v. Schwieckart*, 599

7. In an action of trespass for entering upon premises owned by a church, called St. Peter's church, and cutting down, prostrating and destroying a shed thereon, in the use and occupation of, and belonging to, the plaintiff, the answer denied that the shed was in the use and possession of the plaintiff, or that the defendants injured or destroyed it. For a second answer, the defendants averred that they were trustees of said St. Peter's church; that the parties and other persons attending said church, having changed their place of worship to another edifice near by, known as St. James' church, authorized and directed the defendants to remove said shed, with others, to the premises of the latter church; and that under and in pursuance of such license, the defendants removed the shed to such premises, and there put it up, for the plaintiff's use. *Held* that these answers

did not deny the plaintiff's title to the shed, or set up title in the defendants. And that no question of title to real property arose, upon the pleadings, or was put in issue, within the intent of section 304 of the Code. *ib*

8. A claim of license does not necessarily involve an assertion of title, or raise an issue of title to the land to which it relates. *ib*

9. When the license is alleged to have been given by the plaintiff himself, this excludes the idea of an assertion of title in any one else, or any purpose to question or controvert the plaintiff's title, or put it in issue. *ib*

See ALLOWANCE.
APPEAL.

COUNTY.

See ACTION, 3, 4, 5, 6, 8.

COUNTY COURT.

See APPEAL.

COVERTURE.

See MARRIED WOMEN, 8, 10, 11.

CREDITORS.

See USES AND TRUSTS.

CREDITORS' SUITS.

1. Although it is the usual and the better practice, in actions in the nature of creditors' suits, on a judgment for the plaintiff, to direct the appointment of a receiver and a sale by him; yet it is not improper to adjudge that the property be sold on execution, by the sheriff. *Kennedy v. Barandon*, 209
2. If the complaint, in such an action, is not filed on behalf of the plaintiff and other creditors similarly situated, and it does not appear that there are any other creditors, the judgment should only declare the conveyances fraudulent and void

as to the plaintiff's judgment, and direct a sale for the payment of that, alone, with costs. *ib*

3. A provision, in such a judgment, directing that the surplus moneys on the sale be brought into court, is not appropriate to the case. *ib*

CRIMINAL LAW.

1. Trial.

1. A prisoner under indictment can admit, as testimony to be considered by the jury, on the trial, depositions of non-resident witnesses, taken prior to the trial, or *de bene esse*, by his consent and in his presence. *Wightman v. The People*, 44
2. Where the prisoner, both before and at the trial, consented that depositions so taken should be read in evidence on the trial; *held* that such consent was a waiver of more formal proof, and was binding upon the prisoner. *ib*

2. Accomplices.

3. A court of oyer and terminer has the power, in its discretion, without distinction in respect to the character of the crime, to allow an accomplice to be called and used as a witness for the prosecution. *Lindsay v. The People*, 548
4. And after such discretion has been exercised, and the accomplice has testified, the exercise of such discretion should not be reviewed, upon a bill of exceptions. *ib*
5. If the accomplice is jointly indicted with the principal, a *nolle prosequi* may be entered, as to the former, and he may be examined as a witness against the latter. *ib*

3. Murder; evidence.

6. After proof, by the testimony of an accomplice, of the commission of a murder on the 19th of December, and the removal of the body, by the prisoner, about ten o'clock the next evening, the prosecutor sought to corroborate this evidence by asking a witness, who was at a certain house near the scene of the murder, if he saw the prisoner pass along the

highway about ten o'clock, on any evening in December. This was objected to, upon the ground that the testimony would not be corroborative unless the witness first fixed the time. *Held*, that the question was simply introductory or preliminary. That the proof was directed to an important and material fact tending to connect the prisoner with the commission of the crime, or the evening of its commission; and that it was not inadmissible because it was not, in its particulars, certain, positive or conclusive in establishing such fact. *Lindsay v. The People*, 548

7. That the evidence was proper for the consideration of the jury, and it was for them to pass upon its force and effect. *ib*
8. On a trial for murder, it is admissible to prove that the deceased had two watches, and how he usually carried them, and that one watch, in a buckskin case, such as he usually carried, was afterwards seen hanging up in the prisoner's bed-room; the object being to show that the prisoner had property that had previously belonged to the deceased. *ib*
9. Although the testimony of an accomplice, if fully believed, clearly establishes the guilt of the prisoner as the principal offender, and would justify a conviction; yet it is proper for the people, and they are bound, to make such other proof as they are able to make, in corroboration of such testimony. *ib*
10. They are entitled to give proof both of the facts and circumstances attending the commission of the crime, and also such as relates to the person of the prisoner, and connects him with the accomplice and with the commission of the offence. *ib*
11. An accomplice having testified that the murder was committed in a certain stable; *held* that the testimony of another witness, that he had examined said stable and found marks of blood on the face of the manger, on the stairs, and on boards and stringers therein, was proper; being general evidence corroborative of the accomplice's, in respect

to the place and fact and circumstances of the murder. *ib*

12. *Held*, also, that the positive testimony of experts that they plainly discovered stains on chips taken from the floor-boarding of the prisoner's sleigh, composed of blood, and human blood, was admissible, as corroborative of the testimony of the accomplice, that a spot of blood was seen by him on the floor-boards of the prisoner's sleigh, after the removal of the dead body thereon. *ib*

4. Indecent exposure.

18. Where six women made an indecent exposure of their persons, for money, to five men present and paying therefor; *held*, that such exhibition made the room wherein it occurred a "public place," within the meaning of the statute, although it was a room in a house of prostitution, and not open to the general public. *People ex rel. Lee v. Bizby*, 221

14. *Held*, also, that the offence being a misdemeanor committed by all, at the same time, each aiding and abetting every other, the offence was joint, and the offenders could be jointly prosecuted and convicted. *ib*

See WARRANT.
WRIT OF ERROR.

D

DAMAGES.

See AGREEMENT, 24 to 28.
VERDICT, 2.

DECLARATIONS.

See WILL, 8.

DEDICATION.

1. When a piece of land in a city is dedicated by the owners to the public for the purposes of a park or square, the city, if it accepts the

dedication, becomes seized of it, not in fee, but in trust for the public, charged with the duty of preventing its appropriation to any other uses than such as the donors intended, and of securing to the public the enjoyment of the benefits which it was designed to confer. *Burnett v. Baggy*, 154

2. Unless a private person, living in a corporation in which land has been dedicated for a public use, has acquired in some legal way an interest in such easement, from the person dedicating the land, he cannot maintain an action against a person or corporation interfering with or disturbing such easement; unless he sustains thereby some special and peculiar damage, which is not sustained by the great mass of the inhabitants. *ib*
3. It would be a breach of the trust under which a city holds land, dedicated to the public for the purposes of a park or square, to permit it to be appropriated to private use; much more to expressly permit such appropriation. A breach of trust is never presumed. *Per* MULLIN, J. *ib*
4. The benefits afforded by a public park or square, are those of light, air, prospect and of a public promenade. Inclosing and planting trees upon land so dedicated, does not interfere with the enjoyment by an individual of any of the benefits the laying out of a park or square was intended to confer. *ib*
5. A triangular piece of land in the city of Syracuse having been, by the owners, dedicated to the public for the purposes of a park or square, and accepted by the city, the defendant asked, and obtained permission, from the common council, "to set shade-trees on, and to inclose, a portion of the triangle with a suitable fence." *Held*, that if, under this permission, the defendant should attempt to appropriate the triangle to his own use, an individual citizen could maintain an action against the defendant and the city, to prevent it. But that until that was done, or attempted, he could not maintain such an action. *ib*

DEED.

1. Where the grantors in a deed, although not positively *non compos*, are yet, from age and infirmity, under an influence and in a condition of mind to be little able to guard against imposition, or to resist importunity or undue influence, it becomes the duty of the court to criticise the transaction with severity, in order to see whether fraud, actual or constructive, has been designed and perpetrated. *Sweet v. Bean*, 91

2. The plaintiffs — a man eighty years of age, enfeebled by age and infirmity, both in mind and body, and his wife, who was in a similar condition from recent illness — conveyed a farm worth \$6,500, and surrendered personal property of the value of \$1,500, to the defendant, who had lived with them for many years and had their confidence, upon the understanding that the latter should pay the debts of the grantors, amounting to \$1,500, and support the grantors during their lives. The deed contained a reservation of the use of the farm, for life, to the grantors or the survivor; but there was no covenant by the grantee to pay the debts or support the plaintiffs. The deed was prepared under and by the direction of the defendant; the grantors taking no counsel in regard to the propriety of the arrangement. The referee found that the defendant fraudulently took advantage of the condition of the husband's mind to induce him to make the conveyance, and surrender the personal property, and did in fact obtain the deed from him by fraud and undue influence. *Held*, that these findings, being supported by the evidence, warranted a judgment setting the deed aside for fraud and undue influence. *ib*

DEFENCE.

See LANDLORD AND TENANT.
MARRIED WOMEN, 8, 10, 11.

DELIVERY.

See LIEN, 1.
MORTGAGE, 6, 8.

DEMURRER.

See COMPLAINT, 2, 3.
INFANTS, 1.

DEPOSITIONS.

See CRIMINAL LAW, 1, 2.

DILIGENCE.

See COMMON CARRIERS, 4, 5.

DISCRETION.

See CRIMINAL LAW, 3, 4.
WITNESS, 4, 5.

E

EJECTMENT.

1. In an action of ejectment, upon a lease in perpetuity reserving rent, with a right of re-entry in case of non-payment, brought by one claiming under the lessor, the plaintiff proved a regular transfer of title and interest from the lessor, which had come to and vested in the plaintiff, before suit brought. *Held*, that this chain of title, with possession of the property, was at least *prima facie* evidence that the possession was under that title, and became *actual* evidence of the fact of possession under that title when the last regular grantee in the line claimed the title and demanded the rent reserved, of the tenant in possession, and received from the latter a recognition of his right by a promise from him to pay the rent. *Whyland v. Weaver*, 116
2. The tenant in possession cannot overcome such a title by showing title in himself from the same common source — the original lessor — if there is a want of connection between him and the common source. *ib*
3. Recitals in deeds to former tenants, of conveyances from the common source of title to their predecessors in interest, will not estop the plaintiff in such an action; he not being a privy in the estate flowing through the defendant's chain of title, and the defendant and his successive

grantors being strangers to the plaintiff's chain of title. *ib*

4. After a witness had testified that he knew the premises described in the lease under which the plaintiff claimed, and knew the adjoining lots, he was asked whether the lot described in the complaint was embraced in the boundaries of the lease. He answered that it was. *Held*, that the testimony was competent; the fact inquired of being one which any witness was legally competent to answer, who was acquainted with the land, and the adjoining lands, and their description and locality as connected with other farms or monuments. *ib*

See ADMISSIONS, 1.

EQUITABLE MORTGAGE.

See LIEN, 7.

ERROR (WRIT OF.)

See WRIT OF ERROR.

ESTOPPEL.

1. A party, by assenting to proceedings, aiding them, and approving them, until others act upon his assent and approval, contributes to the creation of an *estoppel* against himself, which binds him. *Matter of Lewis v. City of Utica*, 456
2. Proceedings taken for the opening of a new street in a city, up to the time of the first meeting of the commissioners, were had with the implied assent and approval of the appellant. He appeared at that meeting, and stated that he was an owner of land to be taken, and consented and desired that the street should be opened, "and in that way was a petitioner." He made no objection to the proceedings, until after the report of the commissioners was filed and he was informed of their conclusion. *Held*, that he could not be heard to raise technical objections to the proceedings he had thus promoted, assented to, and co-operated in until after a report therein was made which was a surprise upon him in respect to the amount

of the assessment. His appeal was therefore dismissed. *ib*

3. In such a case, the maxim that "he who will not speak when he should, shall not speak when he would," applies. *ib*

See EJECTMENT, 3

LIEN, 8.

MARRIED WOMEN, 4.

EVIDENCE.

1. Competent and incompetent.

1. In an action upon a promissory note given to the plaintiff's intestate, the defence was that it had been assigned to the defendant's wife. *Held*, that there was no error in allowing the defendant to testify that he saw the note in his wife's possession; that not being a personal transaction between the defendant and the intestate, and therefore inadmissible under section 399 of the Code, but a fact with which the intestate had no then present or immediate connection. *Smith v. Sergeant*, 243

2. Indorsed upon the note in suit was an unexecuted assignment to the defendant's wife. *Held*, that it was erroneous to ask the attorney who drew the papers, whether he supposed the assignment was signed by the payee, at the time; the subject under examination being whether the note had been transferred by the payee, to the defendant's wife. *ib*

3. After proof had been given of statements of the plaintiff's intestate that he had given the defendant's wife \$500; that he had given her \$500 in the personal property, farming utensils, &c.; that he had given her \$500 in the trade, &c., the plaintiff offered to prove that the personal property sold to the defendant was worth at least \$500 more than the price paid. *Held*, that the evidence was admissible, and was improperly excluded. *ib*

4. The plaintiff offered to prove that the defendant's wife had admitted that the payee had always remained the owner of the note. *Held*, that the evidence was improperly ex-

- cluded; it not falling within the rule which excludes the declarations of a former holder of a note, in a suit brought by one to whom it has been transferred for value. *ib*
5. That as the defendant claimed the note by a title growing out of his marital rights, as survivor of his wife—claimed title through his wife in a representative capacity—her admissions were competent, as against him. *ib*
6. An order of the court, vacating an assessment, is not admissible in evidence without the production of the roll or record of the proceedings in which the order was made. *Mayor v. Mayor &c. of New York*, 323
7. But if the order is wholly immaterial, because the fact which it is received to prove is not essential to the plaintiff's right to recover, and the jury cannot be said to have been affected by the improper and illegal evidence, the error of receiving it will not be regarded. *ib*
8. The judgment roll in an action brought by a creditor, against the administrator of a deceased judgment debtor, to reach the interest of such judgment debtor in real estate, to which action the heir at law of the debtor and his wife, the grantee, was not a party, is not admissible in evidence against such heir at law, in a subsequent action, brought against him by a creditor of the intestate for the same purpose. *Chillingworth v. Freeman*, 379
9. In an action brought against the defendant as indorser of a promissory note, the defence was that the indorsement was a forgery. On the trial, the defendant offered to prove that a witness, called by the plaintiff, had been instrumental in getting one B. indicted for the forgery of the note in suit, insisting that if he was so instrumental it militated against, and impaired his opinion, previously given in evidence, to the effect that the indorsement was genuine. *Held*, that this was not necessarily so; and that the evidence was properly excluded. *Marks v. King*, 225
2. *Secondary*.
10. The defendant testified that her husband had access to a drawer in which she had last seen a certain paper, and that he had destroyed some papers which were in the drawer. He was not called on to show that he destroyed the paper, nor was its loss otherwise accounted for. *Held* insufficient evidence of loss to admit secondary evidence of the contents of the paper. *People ex rel. Johnson v. Lord*, 109
11. When it appears that the party offering parol evidence of the contents of a written instrument would have an interest in getting rid of the original, in order to introduce secondary evidence of its contents, the clearest proof of loss is required. *ib*
3. *Parol*.
12. Upon the sale and purchase of a farm, stock and tools, a bond and mortgage were executed by the purchaser for the purchase-money of the farm, and a note was, at the same time, given by him, to the grantor, expressing, on its face, as the consideration thereof, the purchase by him of the grantor's "stock, farming and dairy tools." These papers were executed in pursuance of an oral agreement between the parties, but it did not appear that there was any written contract expressing the terms and conditions of the sale. In an action upon the note; *held*, that it was not erroneous to admit parol evidence of the terms of the sale of the farm and other property. *Smith v. Sergeant*, 243
4. *Striking out*.
13. When evidence is given and received, tending to prove a material fact, it is not the province of the court to strike it out, or exclude it from the jury, on the ground that it is not decisive, or that its weight has been impaired, or effectually destroyed, on cross-examination or otherwise. Its weight is a question for the jury. *Lindsay v. The People*, 548
14. When evidence is objected to, and received under objection and exception, or provisionally, the judge, if doubtful as to its admissibility, may

yield to the objection, and strike out the evidence; and if he does so, and directs the jury to disregard it, this takes the testimony out of the case, and the exception with it. *ib*

15. But when the evidence is received unconditionally, and without objection, the judge has no such power; and it would be error to strike it out, as against the party offering the evidence and injured by its exclusion. *ib*

5. *Conflicting*.—See VERDICT 1, 3, 5, 6.

See ADMISSIONS.

COLLISION, 1, 2, 3, 4.

COMMON CARRIERS, 5, 6, 8, 17.

CRIMINAL LAW, 1, 2, 3, 6 to 12.

EJECTMENT.

LIBEL, 1, 2, 3.

MEMORANDUM.

RAILROAD COMPANIES, 3, 6, 7, 10.

USURY, 1.

WILL, 8, 9.

WITNESS.

EXECUTION.

See CREDITORS' SUITS, 1.

EXECUTORS AND ADMINISTRATORS.

See COSTS, 3.

F

FINDINGS.

See AGREEMENT, 30, 31.

VERDICT, 3, 4.

FIRM-NAME.

See INJUNCTION.

FORECLOSURE SUIT.

See COSTS, 4, 5.

FORMER ACTION.

A former action for the same cause, commenced in another court, is no bar to a subsequent one, where it

appears that no process was ever served in such former action, upon the defendant, and hence the court acquired no jurisdiction over the person; and that the attachment against property, issued therein, has been vacated. *United States v. Graff*, 304

FRAUD.

See ACTION, 5, 6.

DEED.

G

GIFT.

1. A gift by will, by a *cestui que trust* to his trustee, by a principal to his agent, by a client to his attorney, or by a ward to his guardian, is upheld on less evidence that there was no fraud or undue influence, than is a gift *in presenti*. *Decker v. Waterman*, 460

2. Yet if the facts disclose that the person taking the benefit was instrumental in procuring the bequest, then the rule will not be modified, towards him. *ib*

3. Where the circumstances are such that, if a gift had been embodied in a will, as a bequest to the donee, and if the will had been offered for probate, no court would reject the same on the ground that the devisee procured the same by fraud, or the exercise of undue influence over the testatrix, then a gift *inter vivos*, made under the like circumstances, may be upheld, as against the claim of those who take by inheritance. *ib*

See PRINCIPAL AND AGENT, 8, 9, 10.

UNDUE INFLUENCE, 2, 3.

WILL, 4, 5, 6, 7.

GOLD.

See AGREEMENT, 22, 23.

H

HEIRS.

See USES AND TRUSTS, 2.

HUSBAND AND WIFE.

1. Where moneys were received by a husband from his wife, or collected upon notes owned by her at the time of her marriage, or realized from sales of her real estate, during coverture; *held*, that in the absence of any agreement by the husband to refund them to his wife, the same became his absolute property, on being reduced to possession, in virtue of his marital rights. *Fletcher v. Updike*, 364
2. *Held*, also, that a promise, by the husband, to refund such moneys to the wife, made subsequent to the reception thereof, would not create a legal obligation against him; such a promise being without legal consideration, and void. *ib*
3. *Held*, further, that even though the husband received the proceeds of sales of land belonging to his wife, under an agreement with her that he would refund such proceeds to her; yet that, in such a case, there would exist a claim or debt *then due*, in favor of the wife, against her husband, for the amount so received by him; and that twenty-two years having elapsed before the claim was presented to the surrogate for allowance, it was barred by the statute of limitations; unless saved from the effect of the statute by a new and valid promise to pay, or such a recognition of the debt as would have the effect of a new promise. *ib*

Agreement between, for separation.—
See AGREEMENT, 17.

See ACTION, 9, 10, 11.
LIEN, 3, 4, 8.
PHYSICIAN,

I

INDECENT EXPOSURE.

See CRIMINAL LAW, 13, 14.

INFANTS.

1. The objection that plaintiffs, being infants, have no legal capacity to sue in ejectment, should be presented by demurrer, where the fact of infancy

appears on the face of the complaint.
Bartholomew v. Lyon, 86

2. But where the widow of the infants' father unites with them in the suit, it may be assumed that she is the mother of the infants, in the absence of any evidence that the father had a former wife; and hence, as by the death of her husband, who died seised, the mother became vested with the rights, powers and duties of a guardian in socage, she can, as such, maintain the action. *ib*
3. And, the proper party being on the record as plaintiff, and the cause having been tried on the merits, an amendment of the pleadings will be allowed, on appeal, if necessary, to answer the technical objection then first raised, that infants cannot maintain such an action. *ib*

INJUNCTION.

1. It is no ground for an injunction that a proceeding is injurious to the plaintiff, if such proceeding is proper. *Grisler v. Stuyvesant*, 77
2. An injunction restrained the defendant from using the plaintiff's firm name ("Devlin & Co.") in any form or manner; and it further ordered that "the said John S. Devlin be and he is hereby confined—whenever the word Devlin appears or is used in his advertisements, signs, placards, slips or other means and modes of making known his business or place of business, or offering for sale, or selling his goods, &c.—to his own proper Christian, middle and surname conjoined, and without monograms, signs or other devices which may tend to mislead or induce the public or any other person as aforesaid; and it is further ordered that the said John S. Devlin be and he hereby is confined to the use of his own name, John S. Devlin, or J. S. Devlin, without the use of any monogram containing the initials J. S. or other device as aforesaid; but nothing herein is to be construed or interpreted as preventing the said defendant from using his own name in his advertisements, signs or placards." It was not alleged that the firm name "Devlin & Co." had been used; but the defendant had placed

upon his store a sign containing his own name (J. S. Devlin) with the initials "J. S." so arranged as partially to conceal them, and to mislead the public, and induce them to suppose the defendant's store was that of the plaintiff's. *Held*, that this was a breach of the injunction. *Devlin v. Devlin*, 290

3. It is the general rule, and well settled practice, to deny an injunction when the general equities of the complaint are denied. But it is the duty of the court, whenever relief of a temporary or permanent character is refused, otherwise than upon a full consideration of the merits, to make such refusal without prejudice to a new suit or application. *Tammien v. Claves*, 430

See COMPLAINT,
RAILROAD COMPANIES, 12.

INSOLVENT DEBTORS.

1. Upon an application, by an insolvent and imprisoned debtor, to be discharged from imprisonment, the notice required by the statute (2 *Edm. Stat. at Large*, 29, § 4.) was, by the order made, directed to be published in two papers named, and was required to be given for the 6th of June, 1874, at 11 A.M. The publication of the notice, in one of the papers, was of an application to be made on the third of June. *Held*, that upon such a notice the officer had no right to grant a discharge. *People ex rel. Lewis v. Daly*, 325
2. That until the publication of the notice was made as directed, and proof of such publication was before the officer, he was without jurisdiction. *ib*
3. *Held*, also, that the right of the creditor to a *certiorari* in such a case, being positively given by the statute, the court had no right to withhold that remedy, notwithstanding the right of appeal from the erroneous order existed. *ib*

INSURANCE (FIRE.)

1. A policy of insurance contained a provision that, in case of loss or

damage, the insured should forthwith give notice of said loss to the company, as soon as possible, and, within twenty days, render a particular account of such loss, sworn to, &c. The answer set out this condition of the policy, and averred that the plaintiff failed to perform such condition. *Held*, that this was a sufficient specification of a particular breach of, or failure to perform, this condition, to meet a general allegation that the plaintiff had fulfilled all the conditions of the policy, and to put such fact in issue. *Birmingham v. Farmers' Joint Stock Ins. Co.*, 595

2. The proof of loss, required by the conditions of a policy, was not furnished within the time therein specified. The plaintiff claimed there had been a waiver of the proof. The evidence of such waiver consisted of a letter from the defendant's secretary, in which he acknowledged the receipt of notice of the fire and of a request for proof-blanks, and said: "We have no proof-blanks at hand. It will probably be two weeks before our adjuster can reach this case." *Held*, that this was not a waiver of proofs of loss. *ib*
3. One of the conditions of a policy was, that "no act or omission of the company, or any of its officers or agents, shall be deemed, construed or held to be a waiver of a full and strict compliance with the foregoing provision of this section [relating to notice and proof of loss]; nor of any extension of time to the assured for compliance, except it be a waiver or extension in express terms, and in writing, signed by the president or secretary of the company." By another section of the conditions, it was declared that the policy was "made and accepted upon the foregoing terms, conditions and restrictions, and that nothing less than a distinct specified agreement in writing, signed by an officer of the company, shall be construed as a waiver thereof." *Held*, that the above mentioned letter of the defendant's secretary was not such an agreement as was specified in the condition, nor was it so intended. *ib*
4. *Held*, also, that these conditions were binding upon the assured, and

precluded a recovery upon the policy, in a case where it was not claimed or pretended that they had been complied with by serving notice and proof of loss within the time specified therein, and there was no proof of waiver. *ib*

Reforming policy.—See AGREEMENT, 29, 31.

INSURANCE (LIFE.)

1. The suicide of a person whose life is insured for the benefit of another is no defence to an action upon the policy, where there is no stipulation to that effect in the policy. *Patrick v. Excelsior Life Ins. Co.*, 202
2. Although suicide has been called a felony, it will not avoid a policy containing a condition that the same shall be void if the assured shall die "in the known violation of the law of any state." *ib*
3. An applicant for life insurance was asked the question whether he had any "serious disease?" On the trial, the court was requested to charge that if the insured ever had any disease, prior to the application, and did not disclose it, the plaintiff could not recover. *Held*, that the request was too broad; and that the court properly refused to charge as asked. *ib*
4. Inquiries put to an applicant for life insurance are deemed to relate to matters which affect the general health, and the continuance of life, and not to temporary and occasional physical disturbances, the result of accidental causes, to which all men are more or less subject. These are not supposed to be in the mind of the parties. *Barteau v. Phoenix Mutual Life Ins. Co.*, 354
5. But when the party is interrogated in regard to a disease of well-marked symptoms, alarming in character, which are generally regarded as affecting the general health, and as threatening the continuance of life, from the danger of recurrence, he is bound to speak, and to state the exact truth. *ib*
6. In an application for life insurance, signed by the insured, it was de-

clared that his answers to the questions annexed were fair and true; and that any untrue or fraudulent answers, or suppressions of fact, should render the policy null and void. Among the questions then put to him was this: "whether he ever had paralysis?" He answered, "No." The evidence was quite unequivocal, and conclusively showed that the insured had had two serious and alarming attacks of paralysis previous to the issuing of the policy; and that he, himself, stated, on repeated occasions, that he had paralysis; said that he had had two attacks, and was apprehensive that the third would be fatal. The third attack occurred about ten months after the issuing of the policy, and did terminate fatally. *Held*, that the question asked was one of undoubted importance, and the company was entitled to a truthful answer. And that, the statement in the application being manifestly untrue, the policy issued upon such application was void, and no recovery could be had, thereon. *ib*

See AGREEMENT, 33.

INSURANCE (MARINE.)

1. M., being the owner of a steam tug boat, executed a mortgage thereof to the plaintiff, to secure the payment of \$3,650, in which he covenanted to insure the boat and keep the policies assigned to the mortgagee, and in case the policies were not kept up, the latter was authorized to insure and charge the premiums to M. Subsequently, M. executed a second mortgage on said boat to D., to secure \$3,000, which contained a similar provision as to insurance. Later, M., by a bill of sale, sold three-fourths of the boat to F., subject to said mortgages, F. assuming to pay the sums due thereon, having previously become the owner of the other one-fourth of said boat by a purchase subject to the terms and conditions of the first mortgage. F. caused the boat to be insured, in the sum of \$5,000, the policy providing that the loss, if any, should be payable to the mortgagees, to the amount of their interest. A loss occurred, to an amount exceeding the sum insured, and the liability of the

insurers became fixed. *Held*, 1. That, as between the mortgagees and F., the former were entitled to have their mortgages paid, out of the insurance moneys, before F. was entitled to any portion thereof. 2. That F. being the party insured, and having sustained the loss, he was, to the extent of that loss, within the limits of his policy, entitled to be compensated in damages payable by the insurers. 3. But that, as between F. and the insurance company, the mortgagees were the appointees to receive the loss; and they were the real parties in interest, and, to the extent of their respective mortgage debts, were entitled to maintain an action against the insurer. 4. That the insurer, by issuing a policy to F. with a provision that the loss, if any, was payable to the mortgagees, made it a part of its contract that the funds arising upon a loss should be held by it in trust for the mortgagees; or, in other words, it was a part of the contract that the same should be paid to the mortgagees. 5. That as soon as the policy was delivered, the insurance company became liable to pay to the mortgagees, *ratibly*, any loss that might happen; and that liability had ripened, by the happening of the loss, into a debt due the mortgagees respectively. And that F. was entitled to the balance of the insurance money, if any should remain after payment of the mortgage debts. *Ballis v. Dobin*, 507

2. The contract of insurance is a mere contract of indemnity to the assured, against such loss as he may actually sustain, by reason of any of the perils insured against. *Mead v. Mercantile Mutual Ins. Co.*, 519

3. Upon an abandonment and payment, or, in case of a partial loss, adjustment and payment, the underwriters are, in equity, entitled to subrogation to all the rights and causes of action which the insured has against other persons, on account of the loss. *ib*

4. The owner is the person who stands to the whole risk, and must suffer the whole loss; unless he engages another to bear it in the event of a loss. *ib*

5. When another engages to be at that risk for the owner, then the owner and the insurer, as to the ownership of the property and the risk incident to it, are in law considered as one person. Hence each is regarded as beneficially interested in any indemnity which can be exacted from others by reason of the loss. *ib*

6. So, when the owner has been paid his loss, in full, by his insurer, there is a manifest equity in transferring to such insurer any right to indemnity which the owner holds for the common benefit of himself and the insurer. *ib*

7. When a shipper has provided himself with two sources of indemnity, in case the cargo is destroyed or injured during the transportation—one from the carrier, arising out of the operation of the law, the other from an insurance company by virtue of a contract of insurance—the liability of the carrier is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. *ib*

8. The shipper may apply, in the first instance, to whichever of these parties he pleases. If he applies to the carrier, and receives entire indemnity, he has no right to call on the insurer. If he applies to the insurer, and receives his loss, he holds the claim against the carrier in trust for the benefit of the insurer. *ib*

9. A bill of lading does not suppose a policy of insurance, but a policy of insurance does presuppose that there is a liability on the part of the carrier. *ib*

10. N., L. & Co. being under a contract with the owner of a cargo of grain, to transport the same from Buffalo to New York, free from any damage that might happen from the perils of the trip; *held* that they had an insurable interest in the property; and that having caused the same to be insured, by a contract making the loss, if any, "payable to N., L. & Co., or order," such contract could not, by construction, or by the aid of parol proof, be enlarged in its operation so as to make

it cover the risks of other insurers
or persons interested. *ib*

INTEREST.

See AGREEMENT, 27.
NEW YORK (CITY OF), 1.
PROMISSORY NOTES, 16.

J

JUDGE'S CHARGE.

See NEGLIGENCE, 7, 8, 9.

JUDGMENT.

1. If a party omits to apply to the court for leave to enter a judgment, in a case where an application is necessary, the omission is a mere irregularity, and does not render the judgment void. *Bissell v. New York Cn. &c. R. R. Co.*, 885
2. An order of the court, setting aside a summons for want of the proper indorsement, does not operate as a vacation of the judgment; where there is no provision in the order to that effect. *ib*
3. A judgment cannot be set aside for irregularity, on motion, after a lapse of one year from the time of entry, or notice thereof. *ib*
4. The "notice," referred to in section 174 of the Code, means a *written* notice. A verbal notice to the defendant, of the judgment, cannot be held to cut off the power of the court to interfere with the judgment, upon motion. Nor will a notice of retaxation of costs have that effect. *ib*
5. A party seeking to hold a judgment by reason of the lapse of time in moving to set it aside, which judgment is erroneous, or questionable on the merits, should be held to strict practice. *ib*
6. Service of a notice of judgment, to limit the time for appealing, is complete when it is mailed to the attorneys of the other party, properly addressed, &c.; whether it is re-

ceived by such attorneys or not. *Miller v. Shall*, 446

See AGREEMENT, 16.
APPEARANCE.
CREDITORS' SUITS.

JUDGMENT ROLL.

See EVIDENCE, 8.

JURISDICTION.

1. The plaintiff was a resident of this state, and the defendant was a corporation, formed and existing under the laws of Wisconsin. The object of the action was the sale of certain bonds, delivered by the defendant as collateral security for the payment of promissory notes made by it. *Held*, that this court had jurisdiction of the action. *Coffin v. Chicago Northern Pacific &c. Co.*, 887
2. By the terms of the agreement under which the bonds were transferred as security, the transferees, in case of any default in payment by the corporation, were authorized to sell the bonds, at public auction, in the city of Chicago, on giving the notice specified. *Held*, that this stipulation simply conferred the right, and prescribed the mode in which a sale could be summarily made, without either expressly, or by necessary implication, excluding other lawful proceedings for the attainment of the same object. *ib*
3. Accordingly *held*, that the agreement did not place the security beyond the power of courts of justice to dispose of it by their judgments, for the purpose of applying the proceeds to the payment of the debt secured thereby. *ib*
4. *Held*, also, that the bonds having been transferred to secure the payment of negotiable promissory notes, they, as incidents of the notes, would pass to any person receiving them in the ordinary course of business; and that a holder thereof residing in another state was not bound to keep them in the city of Chicago, or return them to that place, in order that a sale of them should be made there. *ib*

5. Where it appeared that a cause of action existed, under the laws of another state; that the defendant (a corporation) had property within this state; that neither the corporation, nor any of its officers, could be found within this state; that the corporation had its office in Chicago; and that none of its officers resided, or could be found, within this state; *held*, that these facts were sufficient to warrant an order for the service of the summons by publication. *ib*

See APPEARANCE.

STATUTORY PENALTIES, 1, 2.
STREETS, 4.

L

LANDLORD AND TENANT.

In an action for rent, the defence was that the premises were destroyed, or rendered unfit for occupancy, by fire. It appeared that there was a sub-tenant of a part of the premises, whose tenancy had not expired. There was no proof that he had surrendered the premises to the lessees, or to the lessors, or consented that the former might surrender his term, as well as their own, to the latter. *Held* that under these circumstances there could not be a surrender of possession of the entire premises, by the lessees, so as to absolve them from payment of rent, under the act of 1860, (*Laws of 1860, ch. 845*.) That, to sustain the defence, it was incumbent upon the defendants to show a substantial surrender of the whole premises. *Smith v. Sonnenkalb*, 66

LIBEL.

1. In an action for libel, private letters, written to the plaintiff by the defendant, tending to show that the libel was published with hypocritical and vicious motives, are admissible to show malice. Malice can be shown by circumstances connected with facts. *Cheritree v. Ragen*, 124
2. In an action for publishing a libel which the defendant claimed had

been sent to him, anonymously, through the post office, by some other person, with a request that he would send the same to the plaintiff, secretly, the defendant offered to prove, by a witness who was not an expert, that the address upon the envelope containing the libel was not in the handwriting of the defendant. *Held*, that this testimony was properly rejected; the best evidence, upon that subject, being the testimony of the defendant himself. *ib*

3. A witness cannot swear to general character, unless he knows it. This knowledge is a thing acquired by time, and by the general speech of the people who know, and who have the opportunity of knowing, and of forming an opinion from that knowledge. *ib*

LICENSE.

See COSTS, 8, 9.

LIEN.

1. Parties may create a lien by delivery of title deeds, or by any other act evincing a clear intention to do so; and the lien will be upheld, as between the parties. *Carpenter v. O'Dougherty*, 397
2. Equity aids the creditor to ripen his lien into effect, and holds the defendant to his agreement. *ib*
3. The defendant entered into an arrangement with the plaintiff for an extension of the time for the payment of a debt he owed the plaintiff, and to secure a judgment; and, as a part of such arrangement, agreed to get from his wife an assignment of a bond and mortgage which he had previously executed, and which his wife held as assignee. He obtained such assignment from his wife, and delivered it to the plaintiff and obtained an extension of the time of payment of his debt, and took up the judgment. *Held*, that by this assignment the wife concluded herself, as to so much of her interest in the mortgage as should be necessary to pay the plaintiff's debt against her husband. *ib*

4. *Held, also*, that if the wife had no title to the bond and mortgage, then, the defendant being the administrator of the mortgagee, they were assets in his hands, and he could pledge the same to the plaintiff, as he did, by delivering the assignment, and agreeing that the plaintiff should hold the same as security for his debt. That the effect of that transaction was to give the plaintiff a good *lien* upon the land mortgaged, as security for his debt of \$1,300. *ib*

5. *Held, further*, that if the defendant took title to the premises as heir at law of the mortgagee, the mortgage interest was not merged in the legal title; he having evinced a clear intention that his interest as heir at law should not thus merge. *ib*

6. That the defendant having elected that the mortgage should be regarded as outstanding, so far as should be necessary to secure the plaintiff's debt, equity required him to stand to that election. And that he must be held bound by his agreement and acts, and to have given the plaintiff a good and valid lien upon the land, to the extent of the debt mentioned in the assignment. *ib*

7. That he had, by such agreement and acts, created, in favor of the plaintiff, an *equitable mortgage*. *ib*

8. Also *held*, that the title of the plaintiff to the mortgage, and its validity, as a lien upon the land described in it, could be upheld upon another principle, viz., that having stood by, and even aided his wife in effecting a transfer of the mortgage as a security, and obtaining further time for the payment of his debt to the plaintiff, the defendant had *estopped* himself from impeaching the validity of the security and defeating the lien thereby created. *ib*

See CHECKS, 4.

VENDOR AND PURCHASER, 4.

LIMITATIONS, STATUTE OF.

1. An acknowledgment or promise, not made to the creditor, nor to any one acting in his behalf, is not sufficient to revive a debt barred by the statute of limitations. *Fletcher v. Updike*, 364

2. To make a promise to pay available to renew or continue the debt, it should be made distinctly to appear that it was made at a time when its effect would be, plainly, to avoid the statute. *ib*

3. Since the Code, parol promises and admissions are insufficient to avoid the statute. *ib*

See HUSBAND AND WIFE, 3.

M

MANUFACTURING CORPORATIONS.

1. In order to render a stockholder in a manufacturing corporation personally liable for the debts of the corporation, under sec. 24 of the act of 1848, (chap. 40,) it is not necessary for a creditor to show a judgment recovered against the corporation, and an execution returned unsatisfied in whole or in part. *Shellington v. Howland*, 14

2. The clause of that section which requires the return of an execution unsatisfied applies only to stockholders who have ceased to be such; not to persons sued as stockholders of the company. An agreement to sell stock, not consummated, is not enough to authorize the defence that the creditor's remedy against the corporation has not been exhausted. *ib*

3. Under section 25 of the act of 1848, a completed transfer of the stock, entered on the books of the corporation, is essential, in order to exonerate the original stockholder from his liability for the debts of the corporation. *ib*

4. The corporation being absolutely required, by that section, to keep a book which shall show who the existing stockholders are, it is no answer to a creditor objecting that an alleged transfer was not registered, to say that the company had no such book, at the time. *ib*

5. Section 24 of the act of 1848, requiring, as a condition precedent to the personal liability of a stockholder, the commencement of a suit against the corporation, for the recovery of a debt, is not complied with by commencing a suit for the recovery of a *part* of the debt. *ib*
6. Accordingly, where a creditor brought an action against a corporation, before a justice of the peace, upon an account for work and labor, &c., amounting to \$366.60, the complaint claiming \$200 only, (that being the extent of the justice's jurisdiction,) and no suit had been brought against the company for the balance of the account: *Held*, in an action by a creditor against a stockholder, that the recovery must be limited to \$200 and interest. *ib*
7. The defendants, who were trustees of a manufacturing corporation organized under the act of 1848, (*Laws of 1848, ch. 40*), and the acts amending the same, were charged with a violation of section two of chapter eighteen, title four of the first part of the Revised Statutes, (*vol. 1, p. 1175, 4th ed.*), in having paid dividends not from the surplus profits of the plaintiff, but by withdrawing and dividing a part of the capital stock without the consent of the legislature. *Held*, that the two statutes were repugnant to, and in conflict with, each other; and that it was not the meaning or object of the law-makers to apply both statutes to trustees of a corporation created under the act of 1848. *Excelsior Petroleum Co. v. Embury*, 261
8. *Held*, also, that the legislature designed to provide, by the act of 1848, itself, for the cases in which individual liability should result from the acts prohibited. *ib*
9. Accordingly, *held*, that an action could not be maintained against the defendants, as trustees, under the provisions of the Revised Statutes. *ib*

MARRIED WOMEN.

1. Where goods are sold and delivered to a married woman on the faith and credit of her separate estate, the title thereto passes to her, and they become *part* and parcel of her separate estate. *Dingus v. Clancey*, 566
2. The defendant, a married woman, purchased of the plaintiffs liquors, to be used in conducting the business of keeping a hotel owned by her and in her actual possession, and which business she was ostensibly carrying on, with the aid of her husband. *Held* that the business of keeping such hotel was, in fact and in law, the business of the defendant, within the intent and meaning of the statute relating to business carried on by married women. *ib*
3. *Held*, also, that the defendant, having so conducted herself as to give the plaintiffs the right to suppose, and act upon the assumption, that she was the actual principal in carrying on the business at said hotel, she could not be allowed to disavow her liability for the goods purchased of them and used in such hotel, for her benefit, and to shift the responsibility for the payment upon her irresponsible husband. *ib*
4. That, under these circumstances, she was *estopped* from saying, as against the plaintiffs, that she was not carrying on the business of hotel keeping on her own account. *ib*
5. Married women, who own property and control and manage it, and carry on business thereon and therewith, in the same manner as if they were unmarried, or men, should be held to all the legal responsibilities growing out of the exercise of such rights, precisely as though they were in fact men. *ib*
6. They cannot be allowed to hold out false appearances, in such business or matters, any more than men; nor to use their irresponsible husbands as agents or instruments of dishonesty and fraud. *ib*
7. Where, in an action upon a promissory note, the defendant pleads that, at the time of making said note, she was a married woman, and that it was not made for the benefit of her separate estate, and was without consideration, the production of the

1. Where goods are sold and delivered to a married woman on the faith and credit of her separate

note on the trial, with proof of the defendant's signature thereto, entitles the plaintiff, *prima facie*, to recover, upon the ground that it is, apparently, upon its face, the note of an unmarried woman. *Downing v. O'Brien*, 582

8. But when, upon the defence, proof is made of the coverture of the defendant, the presumption is changed. Such proof destroys the plaintiff's cause of action, at common law; and if the defendant, and the case, are within the exception of the statutes relating to married women, the plaintiff is bound and entitled to prove it, in reply to such proof. *ib*
9. A ruling which casts upon the defendant the burden of proving a negative, and of making out affirmatively that she had no separate estate, did not carry on any separate business, nor make the contract in question for the benefit of her separate estate or business, is erroneous. *ib*
10. The defence of coverture having been set up in the answer, the defendant, after proving that at the time of making the note, she was a married woman, has established, *prima facie*, a perfect defence to the action. *ib*
11. Such defence can only be overcome by proof that she had a separate estate, or that she was carrying on a separate business on her own account, and that the note was given for her own benefit, within the statutes removing the disabilities of coverture, in those particulars. *ib*

See ACTION, 9, 10, 11.

MAXIMS.

The maxim that "he who will not speak when he should, shall not speak when he would," applied to the case of a land owner who had assented to, and co-operated in, proceedings for opening a street, without raising any objections thereto, until after a report of the commissioners had been made. *Matter of Lewis v. City of Utica*, 456

MECHANICS' LIEN LAW.

1. Under the mechanics' lien law of 1864 applicable to Onondaga county, proof of payments made by the owner to a contractor defeats or avoids the lien created by the first part of section 1. *Smith v. Merriam*, 403
2. To defeat the effect of the statute, the owner is allowed to show that payment has been made, "without notice" of the lien, of all that he became liable to pay. Hence the *onus* of showing payments which will extinguish the lien is upon the owner. *ib*
3. The owner is entitled to be credited with the amount of promissory notes made by the contractor, and indorsed by the owner, which became due and were taken up as payments upon the building contract, before the notice of lien was filed. *ib*
4. It is not absolutely necessary that such notes should have been charged up in the account. It is enough if the contractor has received the money upon the notes, or credit for them, and the owner of the building has become indisputably liable to pay them, by virtue of his agreement and indorsement thereof. *ib*
5. Such a transaction is an agreement by the owner to pay his debt in a particular manner, and is binding upon him. *ib*
6. From the time such agreement is made to pay the notes, as well as from the time of their actual payment by the owner, he is entitled to have them treated as payments upon the building contract existing between him and the contractor. *ib*

MEMORANDUM.

1. A memorandum is not received to corroborate a witness who does not recollect the facts, independent of it, but to recall the facts if he has forgotten them. Where the witness may resort to it to refresh his recollection, it may be read in evidence. But unless it becomes necessary for this purpose, it is wholly incompe-

tent. *Kennedy v. Oswego & Syracuse R. R. Co.*, 169

2. The defendant proved that one of its agents drew up a writing setting out the terms of an agreement for the sale and purchase of wood; that he presented it to the plaintiff's agent who made the contract, who said it was correct, but he wished the plaintiff's name in it instead of his own. It was never signed by either party. *Held*, that the paper was not evidence to show the terms of the contract. *ib*

MERGER.

See LIEN, 5.

MISTAKE.

The owner of a city lot assessed for a street improvement, intending to pay the assessment thereon, by mistake paid an assessment laid upon an adjoining lot, not owned by him, which assessment was afterwards declared invalid and vacated. *Held*, that such owner could recover back the money so paid by mistake, (adopting and reaffirming the decision in *S. C.*, on demurrer, 4 *Thomp. & C.*, 488; 2 *Hun*, 306.) *Mayer v. Mayor &c. of New York*, 323

See AGREEMENT, 29.

PROMISSORY NOTES, 1, 2, 3.

MORTGAGE.

1. A mortgage upon a railroad not completed at the time the mortgage was executed, in terms conveyed the franchise of the company, and all property to be acquired, describing the road as it was then projected. Before the road was completed, a change was duly made in the route. *Held*, that the mortgage as executed bound the road as built; that the bondholders, to secure whose debts the mortgage was given, acquired a right to have the road, as built, sold to pay their bonds; and that purchasers at the foreclosure sale bought, and held, all that the bondholders had a right to have sold. *Elwell v. Grand Street & Newlown R. R. Co.*, 83
2. Although the resolution authorizing the giving of a mortgage, by a railroad company, does not give the president and secretary authority to make so extensive a mortgage as the one in fact executed; yet after the bondholders have advanced their money in good faith, and it has been received and used by the company in constructing its road, this will be deemed a ratification of the contract under which the money was obtained. *ib*
3. As between a first and second incumbrancer by mortgage upon the same premises, where the securities were given pursuant to one and the same arrangement, no money passing between the parties at the time, the second mortgagee has a right to insist that the first mortgagee has no force, as against his junior mortgage, except to the extent that the prior mortgagee has performed the agreement under which such mortgage was given. *ib*
4. Accordingly, where the consideration of the first mortgage was the agreement of the mortgagee that he would take up and satisfy certain demands on which the mortgagor was liable, to the extent of \$20,000; *held*, that neither the mortgagee nor his personal representative could enforce such mortgage, to the detriment or injury of the mortgagor, except to the extent that he had performed the agreement which constituted its consideration and gave it validity. *ib*
5. And, less than \$20,000 having been paid by the mortgagee, on account of such liabilities; *held*, that the mortgage should be reduced, by a deduction of the deficiency. *ib*
6. If a bond be executed and delivered with a mortgage, a subsequent assignment of the mortgage, which does not include, nor purport to include, the bond, is invalid, if it appears that there was no intention to include the bond also. *Carpenter v. O'Dougherty*, 397
7. But if there was no bond given with the mortgage, then the mortgage is the principal and only security, and the only evidence of indebtedness; and an assignment of it by one having the legal title thereto will give

the assignee a good title to the mortgage. *ib*

8. When it appears that a bond was made out at the same time as the mortgage, and that the mortgagee told the mortgagor to keep the bond; and there is some reason to believe that the mortgagee made the mortgagor his *agent*, to keep the custody of the bond; that the retention of the same by the mortgagor was as custodian for the mortgagee; and that the former so understood it; *it seems* this is a good delivery. *ib*

See LIEN, 3, 4, 5, 6, 7, 8.

MUNICIPAL CORPORATION.

See ACQUIRING LAND, &c.
NEW YORK (CITY OF,) 1, 2.
PROMISSORY NOTES, 10 to 16.
STREETS.

MURDER.

See CRIMINAL LAW, 6 to 12.

N

NEGLIGENCE.

1. In an action for negligence, the question whether a bell was in fact rung, at a street crossing, at the time of a collision with a locomotive, was the chief and material question, at the trial, and the only one submitted to the jury. In behalf of the defendant, five witnesses testified positively that the bell was rung; that they both heard and saw it ringing. For the plaintiff, two witnesses testified that, although present and listening, they *heard* no bell. *Held*, that the burden of proof was with the plaintiff, and he was bound to make out his case, by a preponderance in the testimony, upon the whole issue. *Cushman v. New York Cen. &c. R. R. Co.*, 562
2. *Held*, also, that he had failed to do so. That the weight of the testimony was decidedly with the defendant, and the verdict of the jury should have been rendered accordingly. *ib*
3. Although it is the province of the jury to weigh evidence, and to pass upon the credit of the witnesses testifying before them, yet they have no right, arbitrarily and capriciously, to disbelieve the testimony of any unimpeached and uncontradicted witness. *ib*
4. They must consider the relative situation of the witnesses, their means of knowledge, and the character of their testimony; and also their liability to detection and punishment in case they give false testimony. *ib*
5. In an action against the owners of a tug boat to recover damages for negligence in colliding with, and sinking, a canal boat, evidence to show that the plaintiff had an insurance on his boat, and received a part of his loss from the insurers, is inadmissible. *Carpenter v. Eastern Transportation Line*, 570
6. In such an action, negligence is a question of fact, which belongs to the jury, in view of all the evidence and the attending circumstances; and, if no error occurs in the submission of the cause to them, their verdict in favor of the plaintiff cannot be disturbed. *ib*
7. In his charge to the jury, the judge, referring to the testimony of the various witnesses respecting the manner in which the injury was inflicted upon the plaintiff's boat, said: "If those tugs did come down on the plaintiff's boat then, and became loosened from their moorings, then the defendants are chargeable with this negligence." *Held*, that if the case had been given to the jury with the charge unmodified, or uncorrected, it would have been ground for a new trial. *ib*
8. That it would have been correct if the judge had said that such fact raised a presumption of negligence, and cast upon the defendants the burden of proving that such consequence did not follow from the mere getting loose of the tugs, but that such result was imputable to inevitable accident. *ib*
9. At the close of the charge, the defendants' counsel requested the judge

to charge as follows: "That if the defendants' boat came down upon the plaintiff's boat, and was forced to do so by pressure of ice upon the tug, which could not have been avoided by the exercise of care and prudence, then there can be no recovery." The judge so charged. *Held*, that this response of the judge to the request must be deemed to have adopted the language of the request, and to have incorporated the same into the charge. That it obviated the error in the charge as previously made, and justified the overruling of the exception to the charge. And that, in that view, a judgment for the plaintiff could be sustained. *ib*

10. The defendants having undertaken to tow the plaintiff's canal boat from New York to Bridgeport, through the sound and the difficult and dangerous pass of Hell Gate; *held* that they were bound to exercise care, caution and diligence in proportion to the dangers of the navigation, and to tow and keep such boat in safety. That they were bound to employ competent and skilful seamen familiar with the locality and with the customary risks attending the navigation upon the waters of the sound, where the tide ebbs and flows. *ib*

11. *Held*, also, that the defendants' servants were bound to know the state and natural law of the tide, and to take into account its time of flood and ebb, and to guard against all the changes, chances and perils incident thereto; but they were not insurers against the perils of the sea, or of the sound. *ib*

See COMMON CARRIERS.
RAILROAD COMPANIES.

NEW TRIAL.

See PRACTICE, 2, 4, 5 to 12.

NEW YORK BRIDGE COMPANY.

See ACQUIRING LAND, &c., 8 to 14.

NEW YORK CEN. &C. R. R. CO.

See ACQUIRING LAND, &c., 2 to 7.

NEW YORK (CITY OF.)

1. Where land has been taken by the corporation of New York for the extension of a street, under the act of 1818 (*Laws, chap. 210.*) and the damages of the owner have been assessed, and the owner allowed to remain in the possession and enjoyment of the premises, and to collect the rents, until actual possession was taken by the corporation, such continued possession and use of the premises are to be deemed equivalent in value to the interest on the award. Hence no action will lie against the corporation, to recover such interest. *MULLIN, P. J., dissented. Hamersley v. Mayor &c. of New York,* 35
2. The absolute requirement under the act of 1818 (*Laws, chap. 86.*) to pay the award *within* four months from the confirmation of the report is, by the act of 1818, changed to an obligation to pay four months *after* the expiration of the time appointed for carrying the improvement into effect. Until the arrival of the time appointed, or the expiration of the fifteen months, the possession, use and enjoyment of the lands are to remain undisturbed in the former owner and his tenants. There is no constitutional or other difficulty in carrying out this system. *Per DAVIS, J.* *ib*
3. A "messenger to the president of the board of aldermen" in the city of New York, is not a public officer; nor are his duties of an official character; there being no statute creating such an office or defining the duties to be performed officially. Hence the appointment of a person as messenger, and subsequently providing for an increase of his salary, are not within the prohibition of section 11 of chap. 876 of the *Laws of 1869. Smith v. Mayor &c. of New York,* 223
4. The plaintiff was appointed messenger by the clerk of the common council. Subsequently, the common council increased his salary. *Held*, that by this action the common council recognized the right of the clerk to make the appointment; and that the board having the right to delegate the power of appoint-

ment, the court would presume, until the contrary was shown, that the clerk had been duly authorized to make the selection. *ib*

See CONSTITUTIONAL LAW.

NOLLE PROSEQUI

See CRIMINAL LAW, 5.

NUISANCE

See TELEGRAPH COMPANIES.

O

OBJECTIONS.

See ANSWER, 1.

RAILROAD COMPANIES, 6.
TRIAL, 4, 5.

OFFICE AND OFFICER

See CONSTITUTIONAL LAW.
NEW YORK (CITY OF,) 3, 4.

OIL TANKS.

See COMMON CARRIER, 1.

OPINIONS OF WITNESSES.

See COLLISION, 4.
WITNESS, 1.

ORDERS.

Of court.—*See* EVIDENCE, 6, 7.

For payment of money.—*See* PROMISSORY NOTES, 10 to 16.

OYER AND TERMINER.

See CRIMINAL LAW, 3, 4, 5.

P

PARTIES.

Where there is a non-joinder of parties plaintiff, yet if the answer does not

set up such non-joinder as a separate and distinct defence, the objection will be deemed to have been waived. *Chaffee v. Morse*, 252

As witnesses.—*See* VERDICT, 1—WITNESS, 3.

See ACTION, 6, 7, 8, 9, 10, 11.
COSTS, 4, 5.
PRACTICE, 14.

PARTNERSHIP.

1. By articles of copartnership, G., one of the partners, was to devote his time and services, generally, to the business, and was to be allowed \$1,000 per annum, for such services. He discharged the duties he was required to perform; but his salary was not paid, nor credited to him on the books of the firm. It appeared that W., another partner, had the general control of the office business, including the books of account. *Held* that the neglect to enter a credit of the salary in the books was not an act of G., nor a waiver of the salary by him. *Price v. Wilson*, 9
2. The personal liability for debts of a corporation, imposed upon its officers for neglecting to publish a notice under a statute, is in the nature of a penalty; and such a penalty, imposed by the laws of another state will not be enforced in the courts of our own. Hence, upon an accounting between partners, such a liability on the part of one of them, to the firm, cannot be considered. *ib*

PAYMENT.

1. It is well settled that the delivery of a check is not a payment, unless there be an agreement to that effect, or unless the drawer, in consequence of some *laches* on the part of the holder, has sustained loss or injury in respect thereof, and then only *pro tanto*. *Sweet v. Titus*, 327
2. A creditor is not bound to accept a check, even if it be for the entire amount of his claim. *ib*
3. Nor is he bound to receive money. He may, although it be sent to him,

refuse to accept it, and leave the debtor to his plea of tender, when sued for the claim. *ib*

4. He may do this, even though, having received the money, he keeps it subject to the order of the debtor. The latter must withdraw the money, and plead tender, and thus save himself from the costs of the controversy. *ib*

5. The defendants being indebted to the plaintiff in the sum of \$89.29, the proceeds of a consignment of produce sent to them for sale, sent their check for that amount to the plaintiff, with an account of sales. The plaintiff refused to accept the check, claiming that the defendants were indebted to him for balances on former shipments. He did not return or use the check, but held the same subject to the order of the drawers, and offered to surrender it, on the trial. *Held*, that the referee was correct in holding that the check was not a payment *pro tanto* of the plaintiff's claim. *ib*

6. Part payment, by a debtor, of a demand, does not form a sufficient consideration for an agreement by the creditor to extend the time of payment of the balance of the demand. *Tammien v. Clause*, 430

7. But where an agreement to extend the time of payment is based upon the agreement of the debtor, to do, and the doing by him, of an act which he was not in law under obligation to do — as to procure and assign a policy of insurance to the creditor — it is upon a sufficient consideration; it *seems*. *ib*

See MECHANICS' LIEN LAW.
PROMISSORY NOTES, 4, 7, 8.

PENALTY.

See PARTNERSHIP, 2.
STATUTORY PENALTIES.

PEOPLE OF THE STATE.

See ACTION, 7.

PERISHABLE PROPERTY.

See COMMON CARRIER, 10 to 17.

PHYSICIAN.

1. When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts; and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician. *Potter v. Virgil*, 578
2. The plaintiff was employed, as a physician, to attend upon the defendant's wife, and while in attendance upon her, and during the continuance of her sickness, she was secretly, and without the knowledge or consent of the defendant, removed to her father's house; where the plaintiff, at her request, continued to attend her. The defendant, though informed that the plaintiff was still visiting his wife, and intended to continue his visits, did not forbid his further attendance. *Held*, that the contract of employment was not revoked, and the plaintiff continued to be the physician of the wife, after her removal to her father's house; and that the defendant was liable to pay for his services as such. *ib*

POLICY.

See AGREEMENT, 29 to 32.
INSURANCE.

PRACTICE.

1. The attorneys for the plaintiffs and all other persons connected with their office left the same at five and a half o'clock P.M., and the office was closed and locked for the night. Between that time and six o'clock, the clerk of the defendant's attorney came to make service of an answer, and finding the office closed and locked, he procured the janitor of the building to unlock the door, and then left the answer on the table of the managing clerk; the janitor having no authority to open the office for that purpose. *Held*, that such

- entry of the clerk was irregular and unlawful; and that the service of the answer was not regular *Vail v. Lane*, 281
2. The aim and object of the court, in granting motions for a new trial on the ground of *surprise*, is to do justice. *Continental Nat. Bank v. Adams*, 318
3. Counsel are not obliged to disclose any features of the prosecution or defence, unless required by order of the court; but when either does so, to the other, the statement must be made in good faith, and if it be apparently otherwise, though not so in fact, or if it result in inducing a different line of preparation for the trial than would otherwise have been adopted, the burden must fall on the communicant, if there be reason to suppose that justice will be accomplished by applying the rule. *ib*
4. Where the plaintiff's attorney was led, by conversations with the defendant's attorney, to suppose that no serious defence would be interposed, and therefore omitted to summon a material witness; it was *held*, that although no deceit or fraud was intended by the defendant, yet as the acts of his representative did mislead the plaintiff, the discretion of the court was justly exercised in setting aside a verdict for the defendant and granting a new trial on the ground of surprise. *ib*
5. A motion for a new trial on the ground of newly discovered evidence should be denied when the evidence, as set forth in the moving papers, is wholly cumulative, and for aught that appears, it might, with due diligence, have been discovered, and been produced on the trial, had proper efforts been made. *Barreau v. Phoenix Mutual Life Ins. Co.*, 354
6. Where, upon a motion for a new trial on the ground of newly discovered evidence, it is made to appear that a paper found since the trial and produced on such motion, clearly and absolutely settles the question controverted on the trial, on oral proof, contrary to the verdict, then a new trial should be granted; for a false verdict should not be allowed to stand. *Darbee v. Elwood*, 359
7. So, too, if it should appear fairly probable that with the newly discovered evidence, having the strength and verity which usually attaches to a written instrument, a different verdict would be rendered, then, also, should a new trial be allowed. *ib*
8. The rule is, that the newly discovered evidence must be so decisive in character as that it would, to a reasonable certainty, be productive, on another trial, of an opposite result. *ib*
9. Where the paper, claimed to constitute the newly discovered evidence, was enveloped in suspicion to an extent which materially shook its integrity; was shown to be in a mutilated condition, and a portion of it detached; and it was doubtful whether a jury would hold it at all reliable as the precise and *entire* paper set up as a defence on the trial; and, were it produced, the cause would still be one resting on conflicting evidence and doubtful facts, substantially as when before submitted; *held*, that the case was not brought within the above rule. *ib*
10. Newly discovered evidence which goes to discredit a witness is not a ground for a new trial. Evidence which is only material or admissible to contradict the evidence of a witness, and to render him unworthy of confidence, is insufficient. *Carpenter v. Coe*, 411
11. Motions for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court, but the discretion to be exercised must be guided and governed by legal principles, and controlled by the established authorities. *ib*
12. A new trial will not be granted to enable the defendant to prove admissions made by a witness for the plaintiff, inconsistent with the testimony given by him upon the trial; where there is sufficient evidence, if credited, independent of his testimony, to support a verdict for the plaintiff. *ib*

13. Where a party, in his notice of motion, asks for "such further relief as may be just," such relief may be given as the facts presented on the motion warrant. *Bissell v. New York Cen. &c. R. R. Co.*, 385
14. The court may exercise the power to strike out parties, under section 178 of the Code. *Chittenango Cotton Co. v. Stewart*, 428

See Costs.

REFERENCES.

REFERENCE.

TRIAL.

PRINCIPAL AND AGENT.

1. Although an agent, for nonfeasance and omissions of duty, is not liable, except to his principal, the rule is otherwise when the act complained of is misfeasance. In all such cases, he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another. *Crane v. Onderdonk*, 47
2. One dealing with an agent is not bound to know the private instructions to the latter. If the agent is in fact accustomed to make contracts of that nature for his principal, and this is known to the latter, that is sufficient to render the principal liable upon the agent's contracts. *Kelly v. Fall Brook Coal Co.*, 183
3. Where a miner of coal had permitted a coal commission firm to hold themselves out as agents for the sale of coal for him, and had consummated sales on credit, made by them; held, that he would be bound to a third party by a contract for the sale of coal on credit, made for future delivery by such agents; notwithstanding he had privately forbidden them to sell on credit or for future delivery. *White v. Fuller*, 267
4. But when there is a custom of the trade that an agent for the sale of coal has no right unless specially authorized, to make a time contract extending over a long period, persons dealing with an agent are bound by such custom; and a principal will not be liable upon such a time contract, made by an agent, without special authority. *ib*
5. The agent of a coal miner, without authority, contracted to sell coal for future delivery, at a specified price. As soon as the principal was informed of the contract he notified the purchaser that he repudiated the same. At that time the market price of coal was as low as the contract price, and the purchaser might have bought the same quantity of coal at the same price. Held, that the purchaser was not entitled to damages for the failure to fulfil the contract; even if the agent had acted with authority. *ib*
6. Although there be a change of relations between principal and agent, by which the latter, who was previously authorized to sell on credit, is positively prohibited to sell on credit, in future, such change of relations will not affect the rights of third persons who have dealt with the agent, as such, and with the knowledge of the principal. Such persons are entitled to notice of the change. *ib*
7. It is a well settled rule of law that a principal, as to third persons, is bound by contracts made on his behalf by one who holds himself out to be such agent, although in fact he is not, if the principal know of such assumption of authority, and permits it, without taking the steps to prevent its exercise to another's prejudice. *Per BRADY, J.* *ib*
8. The fact that the relation of principal and agent exists, does not prevent the principal from making a voluntary donation to his agent. Such a donation is not absolutely prohibited by the rules of law. *Decker v. Waterman*, 460
9. But when it is established that such a relation exists between the donor and donee, before the validity of the gift will be upheld it must be made to appear that the transaction was unaffected by fraud, either actual or constructive. The burden of proof rests on the donee, to establish its perfect fairness and propriety. *ib*

10. What is sufficient and satisfactory proof, on which to declare a gift from a principal to her agent valid, and free from the taint of fraud or undue influence. *ib*

See STOCK.

PRINCIPAL AND SURETY.

See UNDERTAKING.

PRIVATE PROPERTY.

See STREETS.

PROMISE.

1. A new promise is sufficient to take a debt away from the effect of an antecedent discharge in bankruptcy. *Hopkins v. Ward*, 452
2. A complaint, after setting out a complete cause of action upon a promissory note, stated, as a second cause of action, the making of a promissory note to the plaintiff, by the defendant, dated March 20, 1871, for \$300, for money loaned, payable sixty days after date, with interest, on which there was justly due, on the 1st of June, 1875, the sum of \$300 and interest, "less payments;" that in consideration thereof, the defendant, on that day, unconditionally promised the plaintiff to pay him the said sum of \$300, less a payment made May 18, 1872; and alleged as a breach, the non-payment of the balance of said amount. The defendant's answer contained no denial of the allegations of the complaint, but set up his discharge in bankruptcy, granted Dec. 1, 1874. *Held*, that the allegations of the complaint, being material to the plaintiff's cause of action, and not denied by the answer, they must be taken as true. *ib*
3. *Held*, also, that the new promise, set forth in the complaint and made the foundation of the plaintiff's right to recover, being stated, and proved, to have been made after the defendant was discharged in bankruptcy, the right of recovery thereon was made out. *ib*

4. A promise to pay a debt barred by a certificate of discharge in bankruptcy becomes a new contract, and may be stated as the foundation of the action. *ib*

See HUSBAND AND WIFE, 2, 3.
LIMITATIONS, STATUTE OF.

PROMISSORY NOTES.

1. In an action upon a promissory note, the complaint alleged that the note was dated in 1872 by mistake, and that it was designed to have been dated in 1871. The answer denied these allegations, and the parties went to trial on this and another issue. *Held*, that by answering the allegations, the defendant practically conceded their sufficiency for the trial of the fact of mistake. That it was too late for him, after the trial was actually commenced, to object that the statement in the complaint was defective; and that it was the duty of the court to overrule an objection to the evidence offered to prove the mistake. *Germania Bank v. Distler*, 838
2. The date of an instrument in writing is only presumptive evidence of the time of its actual execution; and whenever fraud or mistake is alleged, this presumption may be contradicted by parol evidence. *ib*
3. A mistake in the date of a promissory note may be asserted as well by an indorsee as by the payee; the entire title being transferred by the indorsement. *ib*
4. The plaintiff held a note made by T. and indorsed by C.; and the firm of C. & Co. being indebted to T., there was an understanding between the plaintiff and those parties that the firm might make payment to the plaintiff; which payment, when made, should apply on such note. Afterwards, C. & Co. gave the plaintiff, first, a check post-dated, and then a note payable in one month, for the amount of T.'s note. Such check and note were received by the plaintiff, not in payment or satisfaction of T.'s note, but merely as collateral to it. In an action upon the T. note, *held* that if T. consented that the firm check and

- note should be taken as collateral, the defendants could not urge, as a defence, the extension of the time of payment, given by such note and check. *Van Etten v. Troudden*, 842
5. And, there being evidence tending to show that the transaction with C. & Co. was with T.'s consent and approval, and the jury having found a verdict in favor of the plaintiff; *held* that, giving full effect to such verdict, the note of T. remained in full force against both maker and indorser. *ib*
 6. That T. & Co. were the principal debtors, and the plaintiff was, at all times, at liberty to pursue them, on their liability thereon; and his right of action was not suspended by reason of his holding the note of third persons, on time, as collateral. That he might enforce his remedy on the principal security, notwithstanding the collateral was not due. *ib*
 7. *Held*, also, that the mere acceptance, by the plaintiff, of the firm note on time, as collateral, without any agreement to suspend the right of action on the principal debt, would not extend the time of payment of such debt. *ib*
 8. *Held*, further, that had it been proved that the plaintiff agreed to accept C. & Co. for the payment of the note in suit, that firm having T.'s money to that amount, it would have operated as an extinguishment of the plaintiff's claim. That although it would not have been technically payment, it would have discharged the debt, by way of accord and satisfaction. *ib*
 9. And that if it had appeared that that defence was withheld from the jury, by the ruling of the judge, it would be held error. *ib*
 10. An instrument signed by the mayor and clerk, and countersigned by the comptroller of a city, addressed to the treasurer, directing the payment to A. or order, of a specified sum "out of local fund, when collected or realized from tax sales, for completing the grading of H. street," &c., is not a bill of exchange, nor a check; but is, in legal effect, a non-negotiable promissory note. *Read v. City of Buffalo*, 526
 11. An action can be maintained upon it, to recover the sum mentioned therein, on an implied promise to pay the debt stated to be due and owing to the payee named therein. *ib*
 12. No demand is necessary, as a condition precedent to maintaining an action upon such an instrument. *ib*
 13. The order being made payable at a particular place, and upon the happening of a particular event, when the fund out of which it is to be paid has been collected and realized by the city, the debt is due and payable, by the very terms of the contract. *ib*
 14. Such orders are not affected by a statute passed after they were given; unless it appears that the legislature intended to change the meaning and effect of outstanding contracts. *ib*
 15. A notice, published in the city paper, that the city is in funds to pay its orders of a particular series, not brought to the knowledge of a holder before the making of his demand, is not sufficient to effect a suspension of interest upon an order. *ib*
 16. Even though the city was ready and willing to pay such an order, at the time and place of payment, it is in no attitude to defeat a recovery of the face of the order and interest down to the day of trial, if it has not brought the money into court for the plaintiff. *ib*
- See* AGREEMENT, 33.
JURISDICTION, 1.
MARRIED WOMEN, 7 to 11.
- PUBLIC USE.
- See* STREETS.
- PUBLICATION.
- See* JURISDICTION, 5.

R

RAILROAD COMPANIES.

1. In an action to recover damages for the killing of the plaintiff's intestate, an employe of the defendant, by a collision caused by the negligence of the latter, evidence was given tending to establish negligence in three particulars: that the train was running at a dangerous rate of speed; that the brakes were imperfect, or out of order; and that the train was insufficiently manned. At the close of the trial, the plaintiff's counsel withdrew the first ground of negligence from the consideration of the jury. The evidence to establish the second and third grounds being very slight; *held* that it was for the jury to say whether the brakes were defective, or the train insufficiently manned, and also whether those causes, if they existed, produced the injury complained of; and that it could not be claimed that a verdict for the defendant was clearly against the weight of evidence. *Moran v. New York Cen. &c. R. R. Co.*, 96
2. *Held*, also, that the proof showing, plainly, that the great speed of the train was the principal, if not the only, cause of the collision, and that question having been withdrawn from the case, as a ground of recovery, the jury were authorized to find against a right of action, and an order denying a new trial, was properly granted. *ib*
3. Where the trial proceeded on the hypothesis that the deceased was an employe of the defendant, engaged in the business of his employment, at the time of the collision; *held*, that evidence to prove what the defendant's practice was, as to hanging out signal lights at a certain point, was properly excluded; inasmuch as the omission to give the signal, (conceding that to have been negligence,) was the negligence of a co-employe engaged in the same general employment. And that there being no evidence that the defendant's employes, or any of them were not skilful and competent, the case was brought directly within the

decision in *Warner v. Erie Railway Co.*, (39 N. Y., 468.) *ib*

4. And that the negligence of the engineer, in running the train too fast, being the negligence of a co-employe, would, within the principle of that and kindred cases, give to the plaintiff no right of action for that. *ib*
5. Where the subject of great speed was expressly waived as a substantive ground of negligence, on the trial; *held*, that it could not be urged, upon appeal, as a circumstance of negligence, that the omission of the defendant to place a signal "caused the increased rate of speed." *ib*
6. The defendant's switchman was permitted to state that, in his opinion, the injury was caused by the running of the train with too great velocity. *Held*, that an objection to this testimony, not specifying any particular ground therefor, was too general to be of any avail. *ib*
7. *Held*, also, that such testimony was harmless; especially as it stood conceded that the subject of great speed was not to be taken into consideration, as a ground of negligence. *ib*
8. Although a railroad company exhibits negligence by running its engines through a populous city at a rapid rate, yet if a party injured thereby contributes, in any degree, by his own negligence, to the injuries received, the company is absolved. *Keesee v. New Haven &c. R. R. Co.*, 205
9. The law does not require that the sight and ears of a person crossing a railroad track shall be immaculate or infallible, but that he shall use them to avoid injury. He may err in judgment; his ears or his eyes, or both, may deceive him, and his judgment thus being at fault, he may contribute to the injuries he receives, and go without remedy; but whether he did so or not is a question for the jury; unless the evidence plainly admits of but one conclusion, and that, that he was guilty of negligence. *Per BRADY, J.* *ib*
10. If the evidence upon the subject of contributory negligence is con-

flicting, it is proper for the court to refuse to dismiss the complaint. *ib*

11. Where the son of a person injured by the defendant's locomotive, who was with him when he was injured, testified that when they came up to the railroad track, they stopped, before crossing it, and each looked both ways, up and down the track, but could not hear if any locomotive was coming; and that there was no whistle blown or bell rung; *held* that this was doing all that the party was bound to do; and that proper diligence, observation, care and caution on his part was shown. *ib*

12. The defendant's charter, granted March 28, 1878, authorized it to construct and use passenger railways, in the city of New York, through certain streets therein, and "through and along West street, with double tracks to Christopher street, at the foot of Christopher street, North river." The plaintiff's charter, granted April 26, 1878, authorized it to lay, construct and use a railroad for passengers in said city, through, upon and along certain routes therein specified, "commencing at Christopher street ferry, and running thence through and along Christopher street, with a single track to Greenwich avenue, * * * thence through and along West street, with a single track to the Christopher street ferry, the place of beginning." *Held*, 1. That the defendant's charter conferred upon it the power to extend its track to the North river, at the foot of Christopher street. 2. That the plaintiff occupied no such relation towards the defendant, or the public streets, as entitled it to maintain an action to restrain the defendant from using the public streets. 3. That the rights conferred upon the plaintiff, by its charter, were not exclusive, and did not prevent the legislature from conferring authority to fix the terminus of the defendant's road at the North river, at the point designated. 4. Nor did it confer upon the plaintiff the power or duty of interfering to protect the public interest, either on behalf of the city or of the general public. 5. That if there was any excess of power in the claim of the defendant to run its

track to Christopher street ferry, the public, alone, could interfere to restrain the defendant by injunction; unless it should be shown that some actual interference with the tracks as laid at that time, by the plaintiff, had occurred, or was about to be attempted. 6. That there were no sufficient grounds for the issuing of a preliminary injunction; and an order making the same absolute was reversed. *Christopher and Tenth Street R. R. Co. v. Central Crostown R. R. Co.*, 315

See ACQUIRING LAND, &c.
COMMON CARRIERS.
NEGLIGENCE.
STATUTORY PENALTIES.

RATIFICATION.

See MORTGAGE, 2.

REAL ESTATE BROKERS.

1. In an action to recover brokerage, of vendors, upon the sale of a farm, the defence was that the plaintiff was not employed by the defendants. The evidence as to the fact of employment being conflicting, testimony was offered by the defendants, going to show that the plaintiff was, in point of fact, in the employment of the purchaser, or acting in his behalf and interest. *Held*, that the evidence was properly admitted. *Miller v. Irish*, 256
2. And there being a question both as to the fact of the plaintiff's employment by the defendants, and as to its extent; *held*, that evidence of all that he said and did, bearing on the subject of his services at and during the time he assumed to act in aid and furtherance of the object sought to be attained, was competent to be proved. *ib*
3. That the defendants had a right to show what he did, and all he did, on the subject of the sale, to the delivery of the deed. But that if the plaintiff had earned his commissions when the contract was signed and delivered, evidence of his subsequent conduct in the matter was inadmissible. *ib*

4. *Held*, further, that if employed simply to obtain a purchaser, the plaintiff's commissions were earned when he produced a satisfactory buyer; but he was bound to show an employment, and the extent of it, and that he had performed the undertaking assumed in the contract with his principals. *ib*

RECEIPT.

See COMMON CARRIERS, 8, 9, 15, 16.

RECEIVER.

See CREDITORS' SUITS.

RECITALS.

See EJECTMENT, 3.

REFEREE.

1. A witness having been examined, before a referee, on the part of the defence, the referee, pending the cross-examination, adjourned the trial. The witness neglecting to appear for further cross-examination, he was required by the referee to appear on one of three days, or, in default thereof, to have his examination stricken out. He failed to appear, and upon the plaintiff's motion and on notice to the counsel of the witness, his testimony was stricken out. *Held* there was no injustice or impropriety in this course. *Price v. Wilson*, 9
2. The power of a referee, to allow amendments, is not as great as the power of the court at Special Term. His power is restricted, like that of the court at circuit. *Chittenango Cotton Co. v. Stewart*, 423
3. The decision of a referee is reviewable on motion, as well as upon appeal. *ib*

See AMENDMENT, 2, 3, 4.
COSTS, 3.

REFERENCE.

1. Where there is an oral agreement, made before the referee, in open

court, at the time of final submission, extending the time for making and delivering the report *indefinitely*, a party cannot terminate the reference, and bar the right to a decision by the referee, by serving a notice under section 273 of the Code. *Ballou v. Parsons*, 19

2. It *seems* that, in such a case, the proper method of terminating the stipulation for indefinite extension is to serve upon the opposite party and the referee, a notice that unless the report is made and delivered within a reasonable time, to be specified, the reference will be deemed ended. *ib*

3. A complaint alleged that the defendant had drawn and received from the comptroller of the city of New York a very much larger sum than was due for services, labor and materials necessary for, and which had been rendered and furnished in and about the construction and erection of a court house. The answer denied this allegation. *Held*, that an issue was thus presented which would probably involve the items of the accounts for labor and materials expended and used in the erection of said building; and hence the action was one which the court was fully authorized to refer, under section 271 of the Code. *Mayor &c. of New York v. Genl.*, 275

4. *Held*, also, that although the action was not upon an account, yet the trial of the issue would involve "the examination of a long account," which made the cause a referable one. *ib*

5. The Code, however, does not *require* such an action to be referred. The court may try it, if it pleases, and a trial without the reference is not erroneous. *ib*

6. The issue in a cause was joined in July, 1874. It was upon the calendar of the Circuit Court, for trial, in December, 1874. The defendant, instead of moving that court, before the judge holding such circuit, moved, in another branch of the same court, before another judge, to take the cause from the trial court and send it to a referee. And this motion was delayed until after preparation for the trial had been made,

and the plaintiffs were presumably ready with their witnesses, and the cause was on the day calendar for trial. *Held*, that to order a reference under these circumstances, would be to encourage delay, and the motion was therefore properly denied. *ib*

7. The death of a defendant, after an order of reference, and the revival of the action in the name of his representatives, do not operate to vacate the order of reference. *Chitenango Cotton Co. v. Stewart*, 423

8. And the defendants, by appearing before the referee and commencing the trial, will be deemed to have waived the right to object to the validity of the reference on the ground of such death and revival in the name of the representatives. *ib*

9. Upon the hearing of a motion, the court may direct a reference to a referee, to ascertain and report the facts in respect to the existence of an agreement which is alleged in the complaint and denied in the answer, with his opinion thereon. *Tammien v. Clause*, 430

RENT.

See LANDLORD AND TENANT.

REVIVOR AND CONTINUANCE OF ACTION.

1. Where a plaintiff is under a stay of proceedings, at the time of his death, such stay does not affect his representatives, so as to prevent a motion by them to revive and continue the action. *Matter of Bainbridge*, 293

2. And unless such motion be made within a year, as required by § 121 of the Code, it will be barred. *ib*

See REFERENCE, 7, 8.

S

SALES.

See AGREEMENT, 4 to 14, 16, 22, 23.

SHERIFF.

See ATTACHMENT, 5 to 8.
CREDITORS' SUITS.

SHIPPERS.

See COMMON CARRIERS.
INSURANCE (MARINE).

STATUTES.

1. A subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one, yet if the latest statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act. *Excelsior Petroleum Co. v. Embury*, 251

2. A subsequent statute, making a different provision on the same subject, is not to be construed as an explanatory act, but as an implied repeal of the former. *ib*

3. When a statute confers authority to take the lands of individuals for public use, and for the assessment of damages upon the property of contiguous owners, the statute must be strictly pursued, step by step; or the proceedings will be without the sanction of law, and void. *Matter of House Avenue*, 350

See ACQUIRING LAND, &c.
CONSTITUTIONAL LAW.

STATUTORY PENALTIES.

1. In an action to recover statutory penalties, commenced by the service of a summons only, there must be an indorsement upon the summons, of a reference to the statute giving the penalties for which the action is brought; otherwise the court will acquire no jurisdiction. *Bissell v. New York Cen. &c. R. R. Co.*, 385

2. But if, after the service of the summons, the defendant serves a notice of appearance, that is equivalent to a service of the summons upon him;

and such appearance gives jurisdiction, and cures defects in previous process. *ib*

8. A complaint contained allegations against the defendant for having, contrary to the "Act to prevent extortion by railroad companies," passed March 27, 1857, charged the plaintiff thirteen cents extra fare from L. to B. on 567 occasions, and asked for judgment for the excess, and \$50 penalty for each violation of the statute. *Held*, that the plaintiff was entitled to recover one penalty of \$50, and the excessive fare paid, but was not entitled to recover 566 penalties, in addition. *ib*

STAY OF PROCEEDINGS.

See REVIVOR AND CONTINUANCE, &c.
WRIT OF ERROR.

STOCK.

1. The plaintiff, at the solicitation of S., who was the owner of certain stock which he had transferred to V., to secure a debt, had agreed to furnish the money required to discharge such debt, and had made the necessary arrangements for an advance of the money to him by W. & S., and deposited with them securities for their protection. *Held* that this was a sufficient consideration for an agreement between him and V. by which the plaintiff was to pay him the amount of his claim against S., and that, upon such payment V. should assign the stock to the plaintiff, and transmit the certificates to some third person, who should deliver the same to the plaintiff on receiving from him payment of the amount due V. *Crane v. Onderdonk*, 47
2. V. transmitted such certificates to O., with the proper power of attorney, to transfer the stock to the plaintiff, and constituting O. his "agent and attorney in fact" to deliver such stock to the plaintiff on receiving payment of the amount due V. Subsequently, O. without the knowledge or consent of the other parties, caused a portion of such stock to be transferred to himself, and the remainder to F. The plaintiff tendered to O. the amount claimed by V., and requested a transfer of the stock to him. O. refused to accept the money and make the transfer, claiming that he and F. were the owners of the stock. *Held* that the plaintiff was the assignee of S.'s right of redemption, and that being ready to perform the duties devolving upon him, as such, he was *pro hac vice*, the owner, and possessed of all the rights of S. and entitled to enforce them. *ib*
3. *Held, also*, that O. having received the stock for the purpose of transferring it to such person as S. should designate, had, in causing the same to be transferred to himself and F. without the consent of S. or his appointee, transcended the power conferred upon him, and was guilty of misfeasance towards the owner of or person entitled to its possession. *ib*
4. *Held, further*, that O. being a wrongdoer, was not in a position either to dispute, or to interfere with, the plaintiff's rights. That he could not take advantage of any assumed defect in the plaintiff's title or interest; and that he having wrongfully converted the stock, and acted in contravention of his trust to V. and his *quasi* trust to S. and to the plaintiff whose interests he knew and disregarded, the plaintiff was entitled to relief against him; and that a judgment dismissing the complaint was erroneous. *ib*

STREETS.

1. Under the authority of a city charter, providing that where lands were to be taken for a street, &c., in case of inability to agree with the owners, as to compensation, commissioners of estimate should be appointed, proceedings were taken to lay out and open an avenue, to extend from River street to the lands of the T. and B. R. R. Co. A resolution thus to open the proposed avenue was adopted by the common council, and a committee appointed to locate and define its boundaries, and to negotiate for the lands required. Such committee, having made the location, by metes and bounds, reported in favor of the opening of the avenue from River street to the lands

of the T. and B. R. R. Co.; that the lands east of Vail avenue could be obtained, for a reasonable price; but that, as to the land west of that avenue, the negotiations with the owners were unavailing; and they recommended the appointment of commissioners of estimate, and reported a resolution to carry the recommendation into effect. The common council accepted the report, and adopted the resolution; but subsequently reconsidered its action; and the acceptance of the report was rescinded, so far as it recommended the opening of the avenue from River street to Vail avenue; and it was resolved that the northern terminus of the proposed avenue should be the easterly line of Vail avenue. *Held*, that in so far as the report was accepted, the appointment of commissioners of estimate became unnecessary, and was unauthorized; inasmuch as it appeared by the report, as accepted, that the lands proposed to be taken could be obtained for a reasonable price, by negotiation. That it was only in case of inability to agree with the land owners that authority was given to appoint such commissioners. *Matter of House Avenue*, 350

2. *Held*, also, that instead of applying for, and obtaining, an order appointing commissioners of estimate, a committee should have been appointed, to obtain terms from the owners who had signified their willingness to accept a reasonable price for their lands. *ib*
3. *Held*, further, that there was no authority for granting an order appointing commissioners of estimate; nor for a subsequent order confirming their report; nor for an order confirming the report of the local assessors. *ib*
4. That these informalities in the proceedings were jurisdictional, and therefore could not be waived. That the common council were bound to follow the course prescribed by law; otherwise jurisdiction to proceed was lost. *ib*

SUBROGATION.

See INSURANCE (MARINE), 3.

SUICIDE.

See INSURANCE (LIFE), 1, 2.

SUMMONS.

See APPEARANCE.

JURISDICTION.

STATUTORY PENALTIES, 1, 2.

SURPRISE.

See PRACTICE, 2, 3.

T

TELEGRAPH COMPANIES.

1. A telegraph company, authorized to lay its cable across a navigable river, but in a way not "to injuriously interrupt navigation," has, to that extent, the protection of the statute, in laying its cable; and such protection will cover all necessary and absolute inconveniences resulting from the exercise of the legal right. *Blanchard v. Western Union Telegraph Co.*, 228
2. If due care be used in laying the cable, in proper position, on the bottom of the river-bed, it will not be deemed a nuisance, as an interruption of navigation. *ib*
3. But where a cable, as placed by a company, did not lie on the river-bed, but was within reach of vessels, such as usually navigated the river at that place, and the plaintiffs' vessel caught upon it, and was injured; *held* that this was an obstruction to navigation, not necessary to carry out the purpose for which the company was organized; and that the company was liable for the damages occasioned thereby. *ib*

TENDER.

See AGREEMENT, 18 to 21.

TITLE TO LAND.

See COSTS, 6, 7, 8, 9.

TOWING.

See NEGLIGENCE, 10, 11.

TRIAL.

1. *Order of Proof.*

1. The order of proof, on the trial, is, in general, if not always, a matter of discretion with the court, and therefore not reviewable. *Marks v. King*, 225

2. *Affirmative.*

2. Where the plaintiff's case, as stated in the complaint, except the averment of indebtedness, is expressly admitted by the answer, and the matters of defence stated in that pleading are entirely affirmative, the affirmative of the issues between the parties, on the record, is with the defendant. *Smith v. Sergeant*, 248

3. But if the plaintiff claims and takes the benefit of a ruling in his favor, upon that question, he cannot be heard to complain of it; and the defendant is not injured by it if, notwithstanding such ruling, the verdict is in his favor. *ib*

3. *Objections.*

4. An objection, urged as a ground of nonsuit, may be obviated by subsequent proof. *Bartholomew v. Lyon*, 86

5. If, when a copy of a paper is offered in evidence, a party intends to raise the objection that the original should be produced, that ground of objection should be specifically stated, in order that it may be removed by further proof. A mere general objection to the reading of the paper should be disregarded. *Van Ellen v. Troudden*, 842

Waiver of.—See ANSWER, 1.

4. *Judge's charge and direction.*

6. When the charge of the court is not given, in the case, and there is no exception to it, or to any refusal to charge, upon request, it must be assumed that the facts were left to the jury with full explanations of the law applicable thereto. *Campbell v. Page*, 118

7. The applicability of an abstract proposition to a case is a matter of judicial cognizance; and the refusal to charge requests, after all that a party is entitled to, upon the evidence, has been charged, is not error. *White v. Fuller*, 267

8. The defendant's counsel excepted to a direction to the jury to find a verdict for the plaintiff, but did not ask that any question of fact should be submitted to it. *Held*, that such a request was necessary, in order to enable him to get the benefit of the error in the direction. *Kennedy v. Oswego and Syracuse R. R. Co.*, 169

9. It can make no difference, in principle, whether the court directs a nonsuit or orders a verdict. In either case, it is the duty of the court to submit conflicting evidence to the jury, if requested so to do. But, in the absence of a request, the court may itself pass upon the facts; and when it does so, the parties will be deemed to have acquiesced in the action of the court. *ib*

See CRIMINAL LAW, 1, 2.
NEGLIGENCE, 7, 8, 9.
WITNESS.

U

UNDERTAKING.

1. The general rule is that the contract of a surety is to be construed strictly, and not to be extended beyond the fair scope of its terms. By that rule, the obligation of parties executing an undertaking for the discharge of an attachment is to be ascertained and determined. *Gilmore v. Crowell*, 62

2. Where such an undertaking provided for the payment of the amount of the judgment which might be recovered against the defendants, and the judgment recovered was against some of them only; *held*, that the failure to recover against all the defendants did not prevent a recovery against the sureties, upon the undertaking. *ib*

3. The object or design of the statute, and the intent of the legisla-

ture, being considered, an agreement by the sureties in such an instrument, that they will pay any judgment obtained in the action, against all or any of the defendants, is fairly within the scope of the sureties' undertaking. *ib*

4. An exception to the sufficiency of the sureties in an undertaking given upon an appeal to the Court of Appeals having been taken, notice of justification was duly given. One of the sureties was approved, and the other not being considered sufficient, an adjournment was had, to give the appellants time to give additional surety. The attorneys then agreed that both the persons offered should be taken as sureties, the appellants' attorney promising to have it "so marked by the court." This was not done; but the appeal proceeded as if it had been, and was heard and decided in favor of the respondent. In an action upon the undertaking; *held*, that the sureties could not raise the objection that one of them failed to justify, and that the approval of the sureties, on justification, was not made, nor the allowance indorsed on the undertaking, as contemplated by section 196 of the Code. *Gopail v. Decker*, 211

UNDUE INFLUENCE.

1. Undue influence consists in destroying the freedom of the donor's will, so as to make his act rather the will and act of the donee than his own. And such influence must be specifically directed to accomplish the thing done. *Decker v. Waterman*, 460
2. If the mind of the donor was brought to a purpose preconceived by the donee, for his own advantage, by an influence the donor could not escape, under the circumstances in which she was placed, and which was deliberately used to effect such purpose, then that influence, or its exercise, was undue and improper. *ib*
3. Testamentary bequests, made by a testator for the benefit and advantage of those who hold fiduciary relations towards him, are not judged altogether by the same severe rule that gifts *inter vivos* are. The same

presumptions are not indulged in, as to fraud and undue influence. *ib*

See DEED.
GIFT.

UNITED STATES.

1. An action, by the United States, for the recovery of a sum of money claimed to be due and owing to the plaintiff, for unpaid duties upon imported goods, may be brought in a state court. *United States v. Graft*, 304
2. The primary object of such an action is not simply to execute the laws of the United States, but to collect a debt by enforcing an obligation due to it. *ib*
3. And in that class of cases, the United States, as a body politic, can maintain an action in a state court, in the same manner as other states and sovereignties may sue. *ib*
4. In the affidavit upon which an attachment, in such an action, was issued, it was stated that the defendant had "imported and brought into the United States, at the port of New York," the goods upon which the duties had accrued. *Held*, that these words amounted to an allegation of an importation of the goods by the defendant, complete in its nature, with the control and possession of the property actually in him. *ib*
5. *Held*, also, that by importing the goods, the defendant had become indebted to the plaintiff for the amount of the duties; and that the law would infer that he intended and promised to pay the same. *ib*
6. *Held*, further, that to enforce that liability an attachment might be issued. *ib*

UNITED STATES SECURITIES.

See COMPLAINT, 4, 5, 6.

USES AND TRUSTS.

1. Real estate was purchased by E. C., and the conveyance taken in the name of his wife, the purchase-money being, in part, advanced by E. C.

Held, that the statute of uses and trusts (3 R. S., 5th ed., 15, §§ 51, 52,) impressed a trust upon the land in favor of persons who were creditors of E. O., at the time the payment was made and the conveyance taken. *Chillingworth v. Freeman*, 379

2. And that a creditor, whose debt was then due, could enforce the payment of the same out of the lands so purchased, and which had descended to the defendant as the heir at law of the grantee named in such conveyance; where it appeared that the debtor had no legal estate which could be reached by a judgment and execution, and that there were no personal assets belonging to the estate of E. C.; that his administrator had settled his accounts and been discharged by the surrogate; and that the defendant was the sole heir at law, and represented the whole estate in the premises. *ib*

USURY.

1. In an action upon a promissory note made by E. & W. to the order of A. & Co., and by them indorsed and sold to the plaintiffs, the answer alleged that the note was made without consideration, to enable the payees to procure the same to be discounted for their benefit by H., but that the same was misapplied by a sale thereof to the plaintiffs at a usurious rate. On the trial, the question, "What was the discount?" was objected to, and the evidence excluded. *Held*, that if the objection was cured by the subsequent statement of the witness that the amount to be taken from the note, he thought, was 24 per cent. per annum, then the usurious rate was established. That if it was not cured, by reason of the indefinite character of that testimony, then the exception remained intact, and was fatal to the validity of a judgment in favor of the plaintiffs. *Hallgarten v. Eckert*, 59
2. *Held, also*, that taking either view of the case, a judgment for the plaintiffs could not be maintained; it being an essential element of the defence that a greater sum than that allowed by law was agreed to be

paid and received, and the question excluded being designed to elicit the proof. *ib*

3. That there was no necessity for requesting the judge to submit any question to the jury. That assuming the proof to have been that 24 per cent. per annum was paid for the discount, then the defence was made out; and if there was no proof, then the exception was well taken, and was controlling. *ib*

UTICA WATER WORKS COMPANY.

See ACQUIRING LANDS, &c., 1.

V

VENDOR AND PURCHASER.

1. *Of land.*

1. As between the original parties to a sale and conveyance of land, where the consideration is money to be paid, and the whole or any part of the same remains unpaid, then the presumption is that a *lien* for the unpaid purchase-money exists, in favor of the vendor; and it is incumbent on those denying its existence to prove that the vendor has relinquished such lien. *Camp v. Gifford*, 434
2. But when the vendee, in consideration of the conveyance to him of the land, has undertaken to do and perform a collateral thing specified, such promise is regarded as payment of the price of the land, and there is no lien. *ib*
3. Whether or not, in such a case, the vendor can have or demand money, from the vendee, is uncertain and dependent upon a contingency which may never happen; and if it shall, it is uncertain when, or in what amount. The right to demand money can only arise upon non-performance of the agreement of the vendee to do the particular thing promised. *ib*
4. Upon the execution and delivery of a deed from the plaintiff to C., his daughter, the latter, as a considera-

tion for the making and delivery thereof, promised and agreed, to and with the plaintiff that she would clothe, care for, support and maintain R., the plaintiff's wife, during the remainder of her natural life. The deed expressed a money consideration, but none was in fact paid, or agreed to be paid. It appearing that the grantee had fully performed her promise; *held* that, in the absence of any allegation or claim that she had failed to perform, the plaintiff could not maintain a suit in equity to establish a *lien* upon the land conveyed, for the purchase-money. *ib*

2. Of chattels.

5. Where, by the terms of an executory agreement, the delivery of goods is to be at a specified place, to a specified person, who, as between him and the buyer, is not authorized to inspect the goods, but has a general authority to receive, weigh and forward such goods as the purchaser sends, and goods are in fact received by the agent and by him consigned to another agent of the buyer, at a distant place for sale, the purchaser will be held to have accepted the goods, and is precluded, in the absence of fraud, from subsequently calling in question the quantity, or quality, of the property sold, in an action brought by the vendor, for the contract price. *Pease v. Copp*, 132

6. It *seems* that it is the duty of the purchaser of an article of merchandise which, in its nature, is open to ready inspection, and which is, by the terms of the contract of sale, to be delivered at a specified place, to provide for the inspection of the commodity before it has been transported from the place of delivery, in pursuance of the buyer's directions. *ib*

7. The defendant contracted with the plaintiff for all the cheese the latter should make, in his dairy, during a specified term, the cheese to be delivered to A., an agent of the defendant at D., who had instructions from the defendant to receive such cheese as should be sent to him, and to weigh and forward the same to the defendant's agent or consignee,

in New York, for sale. Under this contract a quantity of cheese was received from the plaintiff, by A., and was by him weighed and forwarded to New York, in pursuance of the defendant's directions. *Held*, that there was a delivery and acceptance of the cheese. That it was an article that could be inspected, and its quality ascertained; and this should have been done, at A.'s warehouse. And that after the goods had been accepted by the purchaser's agent, and forwarded to New York, it was too late for the defendant to raise any question as to the quality of the cheese. *ib*

See AGREEMENT, 18, 19, 20.

VERDICT.

1. If the plaintiff's case is not free from doubt, on his own testimony, and it wholly fails for want of preponderance of proof, when considered in connection with the evidence of two witnesses on the part of the defence, who were conversant with all the facts, and whose testimony in denial is clear, exact and circumstantial, a verdict in favor of the plaintiff is clearly against conscience; and the judge is justified in setting it aside and ordering a new trial; and that without imposing terms. *Meddaugh v. Bigelow*, 106
2. In an action to recover damages for an injury to the plaintiff's arm, caused by the kick of a horse which the plaintiff had hired of the defendant, the latter having notice of its vicious propensities, the evidence was that the injury was of a serious character, and was likely permanently to interfere with the use of the arm. The plaintiff recovered a verdict for \$1,000. *Held*, that the court could not say, upon the evidence, that the damages were so excessive as to require the verdict to be set aside. *Campbell v. Page*, 113
3. Where the evidence is conflicting it is for the jury, who see the witnesses, hear them testify, and observe their manner of testifying, to settle the questions of fact between the parties. And where the proof is such as to

authorize the jury to find for either party, on the disputed questions, accordingly as they shall credit the evidence favorable to one or the other of them, their verdict is conclusive upon the parties. *Chaffee v. Morse*, 252

4. Where there is sufficient evidence, if adopted as the truth of the case, to vindicate the verdict, the judgment cannot be reversed on the ground that the finding of the jury is unsupported by proof. *ib*
5. Where the evidence is conflicting, if there is some evidence in support of the verdict, which the jury were authorized to credit, their verdict is conclusive upon the court, on a motion to set it aside. *Brooks v. Moore*, 398
6. It is the province of the jury to weigh and determine conflicting evidence; and the court has no right to set aside such verdict as determines in favor of one side or the other represented in such conflict. *ib*

W

WAIVER.

Of objections.—See ANSWER.

Of proof.—See CRIMINAL LAW, 1, 2.

By statute.—See ACQUIRING LAND, &c., 13 14.

WARRANT.

1. A warrant issued by a justice of the peace, commanding the arrest of "Myron Cooter," on a criminal charge, affords no justification to the officer for the arrest and detention of Charles L. Cooter; especially where the evidence tends to show that the felony charged therein was committed by Myron, and not by Charles L.; and that there was no ground of suspicion against the latter. *Cooter v. Bronson*, 444
2. Process for the arrest of a person must so describe him that the officer may know, and that the party whose

liberty is threatened may know, whether he is bound to submit. *ib*

WATER.

See ACQUIRING LAND, &c.

WILL.

1. Capacity of testator.

1. Although a monomaniac may make a valid will, if the delusion which affects the general soundness of his mind has no relation to the subject or object of the will, or the persons who would otherwise be likely, ordinarily, to be the recipients of his bounty; or where the provisions of the will are entirely unconnected with, and uninfluenced by, the particular delusions; yet where the will is the result of that particular delusion which has seized his mind, and controls its operations, the rule is otherwise. *Lathrop v. American Board of Foreign Missions*, 590
2. On an application to the surrogate, for probate of a will executed by B. in 1867, the evidence showed that in 1838 the testator was insane, and was, for some time, confined in the insane asylum. After his discharge, and in 1844, he had an acute attack of insanity. From that time down to the time of his death, in 1870, the proofs showed, in his acts and declarations, numerous facts clearly indicative of an unsound and diseased mind. He was a chronic and confirmed monomaniac in respect to the freemasons, and expressed fears of the loss of his property and life from them. Connected with this delusion was also a delusion that there was a conspiracy among his friends and acquaintances, to rob him of his property. He said he could not have anything to do with his folks; that they were all masons, or under the influence of masons; that he did not want any of his relations to have any of his property, because they were masons. Held that it was quite apparent that the will was prepared, dictated and executed under the influence of these delusions; and that in this view, it was an insane will, and the testator was actually *non compos mentis*,

when it was made and executed, and incapable of making any will. *ib*

3. *Held*, also, that a decree of the surrogate, finding, adjudging and declaring that the testator was not of sound mind and memory, at the time of executing said will, and refusing to admit the same to probate, was right, and warranted by the evidence. *ib*

2. *Effect ; what passes by.*

4. By the terms of a will, property which had been the subject of previous gifts, was, in legal effect, given, by specific bequests, to such prior donees. *Held* that this amounted to a full and complete confirmation of such donations. *Decker v. Waterman*, 460

5. A testatrix, by her will, gave and bequeathed to M. W. and C. D. and their heirs, all the property "left" by her at the time of her death, to be equally divided between them, share alike; and directed as follows: "All property or valuable things heretofore disposed of, or given away, by me, shall not be taken into the account, in making said division." *Held*, that a clear intention was manifested by the testatrix that all previous gifts and presents by her made should stand ratified and confirmed; and hence, that property previously disposed of by gift and the possession delivered, was not embraced in the bequest. *ib*

6. *Held*, also, that a person claiming under the will, as devisee, could not question its validity. And that this court could not inquire into the circumstances under which the will was executed, after it had been admitted to probate by a tribunal having competent jurisdiction. *ib*

7. *Held*, further, that if, in any proceeding, the previous gifts of the testatrix should be held invalid, then, as to the property given, and the avails thereof, the testatrix died intestate, and a devisee would not be benefited by setting the gifts aside. *ib*

3. *Construction, generally ; evidence.*

8. When the language of a codicil is clear; when no question arises as to

the phraseology used; and no uncertain or ambiguous words are employed, the declarations of the testator to the scrivener who drew the codicil are inadmissible to establish the intention of the testator, at the time he executed the instrument. *Magee v. Magee*, 487

9. But evidence of the facts and circumstances under which the codicil was executed may be received, and may be looked into in determining what inferences and presumptions arise. *ib*

10. A will and codicil are to be taken in their several parts, and read and construed together as one instrument. *Lynch v. Pendergast*, 501

11. It is the duty of the court to reconcile all the language employed by the testator, if possible; and to give such a construction as will carry it out and into effect. *ib*

12. The intention derived from the language used is to be the polar star, to guide in the construction to be given. *ib*

4. *Construction in particular cases.*

13. A testator, by his will, divided the rest and residue of his estate equally among his children and the lawful issue of such of them as might die before the period of his own decease. He then declared it to be his wish that his executors should cause the portion that might belong to his daughters "to be secured for them for their separate use during their natural lives free from the control of any husband. * * * And in case of their dying without issue, such portion of their said property as may remain at the time of her or their death, shall revert to her or their surviving brothers and sisters, or to their issue in case of their death, as hereinbefore provided for, subject, however, to the right of such daughter to dispose of one-half of such property, by will * * *." A codicil provided for the payment of certain legacies out of the estate not given by the will, and then proceeded to describe the interests designed to be given to the testator's children, because there might be

some obscurity in the will as to the title to their portions. He then again gave the residue of his estate, in equal portions, to his children and the lawful issue of such as might die before him, as he previously had done by the terms of the will, to his sons in fee simple and absolutely, and to his daughters, "an estate for life, remainder to the lawful issue of each respectively, if any such they leave, in fee simple and absolutely, subject to the right of my said daughters to dispose of one-half of their share by will, as in my said last will and testament provided." The testator then empowered his executors to rent the real estate, and divide the net income, or balance of the rents, among the parties who would be entitled to the proceeds of the realty if sold; "and in case any of my said daughters die without leaving issue, then such portion of her share as she shall not have devised or bequeathed * * shall pass to her or their brothers and sisters, or to their issue in case of their death, as in said will provided." *Held*, 1. That the interests provided for the daughters by the will were essentially modified by the language used in the codicil. 2. That the codicil gave to each daughter a life estate in her share, without the right to control or reduce the capital, except by her will, and restrained her power in that respect to one-half the amount of the share provided for her. 3. That this authority over the share was not repugnant to the purpose of limiting the interest of each daughter to a mere life estate. 4. That the testator evidently designed that the shares of the daughters should not go into their possession, or be subjected to their control. 5. That the testator contemplated some disposition of the share of each daughter which would secure it for her use, free from the control of her husband; and that could only be properly effected by the intervention of a trust. 6. That the court had the power to appoint a trustee, to whom the interest of a daughter of the testator, in his estate, should be transferred, and who should hold the same as her trustee, and pay over to her the income thereof during her natural life. *Livingston v. Murray*, 214

14. The third provision of a will was so framed as (1,) to carry to the executors \$44,000 "in trust to receive the income, issues and profits there from;" (2,) to "pay over the same semi-annually" from the death of the testator, to his wife, the plaintiff, for her support and maintenance for and during her life; and after her decease, the securities, so valued at \$44,000, were given and bequeathed, viz., \$10,000 to be held by the executors in trust, to pay over the income to the grandson James L., after the death of the wife, up to the time James L. should attain the age of twenty-one, and then, if the wife should have died prior to that time, the \$10,000 principal was to be paid over to the grandson "for his own use and benefit." It also made a provision in effect similar to that made for James L., for the granddaughter, Eliza L., and she was to have the income thereof till she was twenty-one years of age, after the death of the widow, and then the principal, \$10,000, was to be paid over to the said Eliza L., for her own use and benefit. The will also provided that in case either of the said grandchildren should die before the wife, the share of such deceased one should go to the survivor of such grandchildren. If both of the grandchildren died before the wife, then the \$20,000 was, at her death, to be divided equally between the testator's children, Mary J., John and Louisa. It also gave to his children "the remaining \$24,000 *herein set apart*, at the death of his (my) said wife, to be equally divided between them." By the 11th clause of the will, the testator directed his executors to *invest* the sums in his will "given to them in trust, in any good securities," and authorized them "to *change or vary* the investments and collect any of the securities held by him." By a codicil to said will, the life estate previously given to the wife was enlarged to an absolute estate in fee, "and to draw the income arising therefrom" as provided in the will; subject to the said provisions to the grandchildren; and the sum of \$10,000, given to the grandchildren was directed not to be paid over to them until each should attain the age of twenty-five years. *Held*, that

by the will and codicil, construed together, the plaintiff took (1.) The "absolute estate," or sole ownership of \$24,000 of the \$44,000; or, in other words, a legacy of \$24,000; (2.) And the right to the income of the other \$20,000, to be paid to her by the executors during her life; (3.) The income so paid to her was hers absolutely, to hold to herself and her heirs. *Lynch v. Pendergast*, 501

15. *Held*, also, that the executors should keep in trust \$20,000, invested in good securities, and pay the income to the plaintiff during her life; and in case she should die before the grandchildren named were twenty-five years of age, the income should be paid to them, or the survivor; and after that period should come, and such grandchildren should be twenty-five years of age, and the plaintiff should die, then the principal of the \$20,000 should be paid to the grandchildren, or the survivor, as provided in the will. *ib*

See AGREEMENT, 17.
GIFT.
UNDUE INFLUENCE.

WITNESS.

1. A wrecker, who has been in the business for twenty years, has raised sunken vessels, has superintended an examination of a particular vessel after she was sunk, and made soundings around her, may be asked whether she could be raised, and what it would cost to get her up. *Blanchard v. New Jersey Steamboat Co.*, 101
2. Where a witness for the defendant had, on his examination, denied the making of certain statements, pertinent to the issue, his attention being called to the time, place and occasion; *held*, that it was competent for the plaintiff to prove that he did make them, for the purpose of affecting his credibility. *ib*
3. A plaintiff, being now permitted to state his own case, as a witness, ought, when he is conversant with

all the facts, to be able to make his right of action entirely plain. *Meddaugh v. Bigelow*, 106

4. Where a witness testifies to a palpable untruth, in the presence of the court, the power of the court to order the sheriff to take him into custody, for perjury, is undoubted. *Linsday v. The People*, 548
5. It is a question of discretion with the court whether it will order him into custody, or direct other proceedings to be taken to punish him for the perjury. And with the exercise of that discretion a court of review has no power to interfere. *ib*
6. Although it is the province of the jury to weigh evidence, and to pass upon the credit of the witnesses testifying before them, yet they have no right, arbitrarily and capriciously, to disbelieve the testimony of any unimpeached and uncontradicted witness. *Culhans v. New York Cen. &c. R. R. Co.*, 562
7. They must consider the relative situation of the witnesses, their means of knowledge, and the character of their testimony; and also their liability to detection and punishment in case they give false testimony. *ib*

See EVIDENCE.
LIBEL, 3.
REFERENCE, 1.

WORK AND LABOR.

See ANSWER, 6.

WRIT OF ERROR.

1. The writ of error is a writ of right, and issues as a matter of course, in cases of misdemeanor. *People v. Tweed*, 496
2. The direction for a stay of proceedings, on a writ of error, is not a matter of course, but rests in the sound judicial discretion of the officer allowing the writ. *ib*

3. When it appears that the points urged in support of an application for a stay of proceedings were raised upon the trial, and overruled by the judge presiding, as well as by another judge, upon a writ of *habeas corpus*; that the prisoner has voluntarily allowed considerable delay, since the trial, without presenting his case to an appellate court for review; that no application for a stay has been made to the judge who presided at the trial, nor to any other judge of that district; and the application is finally made to a judge outside of the judicial district in which the trial took place; it is a proper exercise of discretion for the latter judge to refuse the stay, with leave to withdraw the application, and without prejudice to any further application to another officer.

E. H. A. B.

END OF VOLUME SIXTY-SEVEN.

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